TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1928 29

No. 629 25

C. A. LINDGREN, ADMINISTRATOR OF THE ESTATE OF C. E. BARFORD, DECEASED, PETITIONER,

vs.

THE UNITED STATES OF AMERICA AND COLONNA'S SHIPYARD, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 15, 1929

CERTIORARI GRANTED FEBRUARY 25, 1929

(33,938)

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TRANSCRIPT OF RECORD

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF VIRGINIA, ss:

At a District Court of the United States for the Eastern District of Virginia, begun and held at the Court Room in the Court House and Post Office Building in the City of Norfolk, Virginia, on the first Monday of May, being the 7th day of the same month, in the year of our Lord one thousand nine hundred and twenty-seven.

Present: The Honorable D. Lawrence Groner, Judge of the District Court of the United States for the Eastern District of Virginia.

Among other were the following proceedings, to-wit:

LIBEL.

(2) Filed March 16, 1927.

C. A. Lindgren, Administrator of Estate of C. E. Barford, Deceased, Libellant.
v.
Colonna's Shipyard, Incorporated, a corporation, and United States of America, Respondents.

In Admiralty. No. 4655.

To the Honorable D. Lawrence Groner, Judge of the Court aforesaid:

The libel of C. A. Lindgren, administrator of the estate of C. E. Barford, against Colonna's Shipyard, Incorporated, a corporation, and the United States of America, in a cause of tort and death by wrongful act, civil and maritime, alleges as follows:

First: That C. E. Barford who died on October 5th, 1926, was a citizen of the United States and a resi-

dent of the City of Norfolk, Virginia, and that C. A. Lindgren duly qualified in the Circuit Court of the City of Norfolk, Virginia, as administrator of the estate of the said C. E. Barford, deceased, on the 14th day of January, 1927.

Second: That Colonna's Shipyard, Incorporated, is a corporation organized and existing under and by virtue of the laws of the State of Virginia, with its principal office in the City of Norfolk, Virginia, and engaged in general docking and repairing of ships, and the United States of America was at all the times hereinafter mentioned, and now is the owner of the steamship "Hybert", a large and valuable steel ship employed as a merchant vessel and lying at the port of Houston, Texas, at the time of the filing of this libel.

(3) Third: That on October 5th, 1926, at about 1:30 P. M., the said C. E. Barford was engaged in his duties as Third Mate, and as such a seaman on said steamship, which was then in the drydock of the said Colonna's Shipyard, Incorporated; that shortly before the incidents hereinafter recited he had been ordered by the Chief Officer of said steamship to secure the measurements of a small ball and catch which blonged in the bottom of the life boats of said steamship; that in order to secure the exact measurements of said ball and catch, said C. E. Barford crawled or climbed into life boat #4; that said life boat at that time was swinging on the vessel's davits over her port side aft of amidships and suspended over the said drydock, and two members of the crew of said steamship were engaged in storing or putting in place the bottom boards of said life boat; that due to the defective hooks, blocks or fastenings of the lines between said life boat and said davits, the negligent, careless and improper manner in which said life boat was fastened to the same and the careless, negligent and wrongful manner in which said life boat was swung over the side of said steamship above said drydock, one end of said life boat suddenly became released in such a manner as to cause said life boat to swing downward alongside said steamship and to throw or *preicipate* without warning the said C. E. Barford from the said life boat to the drydock a great distance below so forcibly and violently as to instantly cause his death.

Fourth: That the decedent at the time he met his death as aforesaid, was strong, well, in good health and able to follow his vocation in life, and was earning good wages, all of which will be shown at the trial of this case.

Fifth: That by reason of the premises the estate of the said C. E. Barford, deceased, and your libellant as administrator of the said estate, for and on behalf of the decedent's dependents and heirs, are entitled to recover the su mof Tem Thousand ($10,000.00) Dollars, damages for the death of the said C. E. Barford, caused by the wrongful act of these respondents.

(4) Sixth: That the death of the said C. E. Barford and the events resulting in his death were due to no negligence or want of care on the part of the said decedent, but were occasioned solely by the fault, negligence, wrongdoing and want of care on the part of these respondents, their officers, servants and employees in the following particulars:

As to the said Colonna's Shipyard, Incorporated:

(1) In carelessly and negligently swinging said life boat on the davits of said steamship and over the side of said steamship and suspended above the drydock a great distance below, and permitting the said life boat to remain in such position, thereby incurring liability for damages to said life boat or injuries to the members of the crew of said steamship while performing the duties required of them in said life boat;

(2) In carelessly and negligently failing to return said life boat to its proper place upon the deck of the said steamship after the purposes had been accomplished for which it had been swung over the side of said steamship, and over the drydock below;

(3) In failing to carefully inspect the lines, hooks, blocks and fastenings between said life boat and the said steamship's davits before swinging said life boat over the side of said steamship and above the drydock below in order to guard against the same breaking or becoming released or unfastened;

(4) And in such other and further particulars as will be shown at the trial of this case.

As to the United States of America:

(1) In failing to use due and proper care to provide a reasonably safe place for the decedent to perform the duties required of him;

(2) In failing to furnish, provide and maintain good, strong and adequate lines, fastening, blocks and hooks between the davits of said steamship and the said life boat sufficient to bear the weight of said life boat and members of the crew required to work therein;

(3) In failing to properly inspect the said lines, fastenings, blocks and hooks between the davits of said steamship and said life boat;

(5) (4) In failing to warn and caution members of the crew required to work in said life boat and to store or place the bottom boards therein, of the existence of a patent or automatic catch or release under the seats or by the pontoons of said life boat which, when struck, released the said life boat from its fastenings and permitted the same to fall from the davits of said steamship;

(5) In failing to instruct the members of the crew of said steamship as to the safe manner in which to store the bottom boards of said life boat, and to avoid striking and releasing the patent or automatic hooks or catches through which were fastened the lines between the davits of said steamship and said life boat;

(6) In negligently and carelessly requiring members of the crew of said steamship to work in said life boat while the same was so suspended over the side of said steamship and above the drydock below;

(7) In not exercising the degree of care required by law in failing to return said life boat to the deck of said vessel before members of the crew were ordered therein for the purpose of storing boards;

(8) In failing to furnish a competent master, officers and crew on said steamship for properly performing the duties required of them thereon, and particularly a chief officer who through incompetence permitted members of the crew of said steamship to engage in storing bottom boards in a life boat containing patent and automatic hooks, releasing it from the davits of said steamship while said life boat was suspended over the drydock in which said vessel then lay, and in permitting the Third Mate on said steamship to enter said life boat for the purpose of securing for the said chief officer the measurements of a certain ball and catch therein;

(9) And in such other and further particulars as will be shown at the trial of this case.

Seventh: That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, your libellant prays that citations, in accordance with the laws and practice of this Court, may issue against these respondents, citing them to appear and answer all and singular the matters aforesaid; that this *libellnat* may have judgment for the amount of damages alleged in the libel with interest and costs, either severally or jointly against the Colonna's Shipyard, Incorporated, and the United States of America; that any (6) judgment against the United States of America shall be in accordance with the provisions of the Act of Congress of March 9th, 1920; and that libellant may have such other, further and general relief as to the Court shall seem just.

C. A. LINDGREN,
Administrator of the estate of C. E. Barford, deceased, Libellant.

LUCIAN B. COX,
KELSEY & JETT,
Proctors for Libellant.

State of Virginia,
City of Norfolk, to-wit:

C. A. Lindgren, being duly sworn, deposes and says that he qualified as administrator of the estate of C. E. Barford, deceased, on the 14th day of January, 1927, and that the matters and things stated in the foregoing libel are true to the best of his knowledge, information and belief, and as to such matters stated upon belief, he believes them to be true.

C. A. LINDGREN.

Subscribed and sworn to before me this 8th day of March, 1927.

WILFRIED P. BOOKER,
Notary Public.

Commissioned as Wilfried Price.

(7) **INTERROGATORIES PROPOUNDED TO THE RESPONDENT, THE UNITED STATES OF AMERICA, TO BE ANSWERED IN WRITING AND UNDER OATH:**

Annexed to Libel.

1. State the date that C. E. Barford joined the steamship "Hybert", whether or not he was acting as Third Mate at the time of the accident referred to in the libel, and the amount of wages the said C. E. Barford was then receiving.

2. Produce and file the shipping articles of the said steamship "Hybert", if any, for the voyage for which the crew then on board the said steamship had been employed.

3. State the name of and describe the patent release

installed on life boat #4, then on the steamship "Hybert".

4. State the name of, age, previous sea-faring experience, if known, and capacity of the two seamen who were in the life boat of the steamship "Hybert" on October 5th, 1926, which fell from its davits, causing the death of the libellant herein and the said two seamen.

5. State when the said two seamen were employed or signed articles on said steamship, who employed them and what officer ordered them to store or put in place the bottom boards of said life boat, and what, if any instruction or warning was given them with reference to the manner in which this work was to be done.

6. State the name and address of the boatswain, or who was acting as boatswain, on said steamship at the time of the said accident.

7. State the address of Anthony Steeghs and John Dillon, seamen of said steamship, and the name and address of the Second Mate on said steamship.

8. State the names and addresses of the officer and members of the crew of said steamship who rigged the blocks and falls of said life boat and hooked them on just a few hours prior to the accident.

(8) What inspection and repairs, if any, were made to the tackle of said life boat, and by whom made, after a report had been made by John Dillon to the boatswain that the tackle, blocks and hooks were defective or improperly fastened.

10. State the approximate length, breadth, depth, weight, capacity and metal of which life boat #4 was constructed.

11. State who swung said life boat over the side of said steamship and for what purpose and for whose benefit it was so swung.

ORDER FILING ANSWER OF COLONNA'S SHIPYARD, INC.

(9) Entered and filed October 17, 1927.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK.

C. A. Lindgren, administrator of estate of C. E. Barford, deceased,
vs.
Colonna's Shipyard, Incorporated, and The United States of America.
} In Admiralty.

On motion of Colonna's Shipyard, Incorporated, leave is granted it to file its answer in this cause, and the same is accordingly filed.

D. LAWRENCE GRONER,
U. S. District Judge.

Norfolk, Va.

ANSWER OF COLONNA'S SHIPYARD, INC.

(10) Filed October 17, 1927.

(Title omitted.)

To the Honorable D. Lawrence Groner, Judge of said Court:—

The separate answer of Colonna's Shipyard, Incorporated, one of the respondents, to the libel heretofore filed in this cause alleges as follows:

First;—It is ignorant of the matters and things alleged in the first article of the libel and can therefore neither admit nor deny the same, and calls for proof.

Second;—It admits the allegations of the second article with respect to the incorporation and existence of

this respondent; and as to the other matters therein contained, it believes them to be true.

Third;—Except for its knowledge that the life boat referred to in the third article was hanging in its davits over the side of the ship and that C. E. Barford fell therefrom and sustained injury resulting in death, this respondent is ignorant of the matters and things alleged in said article and can neither admit nor deny the same, but calls for proof.

Fourth;—It is ignorant of the matters alleged in (11) the fourth article of said libel and can neither admit nor deny the same, but calls for proof.

Fifth;—So far as this respondent is concerned, the allegations of the fifth article are denied.

Sixth;—This respondent denies the charges of negligence alleged against it in the sixth article, and denies the breach of any duty owed by it to the libellant.

Seventh;—It admits the jurisdiction but denies that all and singular the premises are true.

And having fully answered, it prays to be hence dismissed with its reasonable costs.

COLONNA'S SHIPYARD, INCORPORATED,
By BENJ. O. COLONNA,
Vice-President.

HUGHES, LITTLE & SEAWELL,
Proctors.

Subscribed and sworn to before me this 14th day of October, 1927.

JULIA K. GOFF,
Notary Public.

ORDER FILING EXCEPTION OF THE UNITED STATES TO LIBEL.

(12) Entered and filed October 17, 1927.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK.

C. A. Lindgren, Administrator of the estate of C. E. Barford, deceased,
vs.
Colonna's Shipyard, Incorporated, and the United States of America,
} In Admiralty.

On motion of the United States, by its counsel, leave is granted it to file its exception to the libel in this cause, and the same is accordingly filed.

D. LAWRENCE GRONER,
U. S. District Judge.

EXCEPTION OF UNITED STATES TO LIBEL.

(13) Filed October 17, 1927.

(Title omitted.)

To the Honorable D. Lawrence Groner, Judge of said Court:

The United States, one of the respondents in the above entitled cause, excepts to the libel heretofore filed herein.

And for grounds of its exception it shows:

That it appears from said libel that this is an action for damages for personal injuries resulting in death; that the Constitution reserved to Congress exclusive jurisdiction in admiralty, saving only to suitors their common law remedy where the common law was competent to give it; that neither by the common law nor in admiralty was there a right of action for damages for personal injuries resulting in death; that while in the

absence of action by Congress the Federal Courts adopted and administered the death statutes of the State of Virginia, yet that Congress has now legislated upon the subject by the Act of March 30, 1920, and by the Act of March 4, 1915, section 33 of which last named Act providing a remedy in such cases, which under the Constitution is exclusive, and therefore the statute of the State of Virginia creating a right of action for damages resulting in death does not apply, and libellant has failed to state a cause of action against this respondent.

HUGHES, LITTLE & SEAWELL,
Of Proctors for the United States.

ORDER OVERRULING EXCEPTION OF THE UNITED STATES TO LIBEL.

(14) Entered and filed October 21, 1927.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

C. A. Lindgren, Administrator of the Estate of C. E. Barford, deceased,
vs.
Colonna's Shipyard, Incorporated, a corporation, and United States of America.
} In Admiralty.

This cause came on this day to be heard upon the libel and the exceptions of the United States of America thereto, and the Court having fully heard the argument of proctors upon the said exceptions and being of the opinion that the same should be overruled;

It is ordered by the Court that the exceptions of the United States of America to the libel heretofore filed herein be, and the same are hereby ovrruled, with leave to it to answer.

D. LAWRENCE GRONER,
U. S. District Judge.

Norfolk, Virginia.

ANSWER OF UNITED STATES TO LIBEL.

(15) Filed October 22, 1927.

(Title omitted.)

To the Honorable D. Lawrence Groner, Judge of Said Court:

The answer of the United States of America, one of the respondents, to the libel heretofore filed in this cause, without waiving its exceptions to said libel, heretofore filed, alleges as follows:

First:—It is ignorant of the matters and things alleged in the first article of said libel and can neither admit nor deny the same; but calls for proof.

Second:—On information and belief it admits the allegations of the second article to be true.

Third:—On information and belief it believes the recitals of fact contained in the first part of the third article to be generally true and that C. E. Barford was precipitated from one of the life boats to the dock, as a result of which he died; but it denies each and every allegation with respect to the condition of hooks, blocks or fastenings of the lines and each and every allegation of negligence contained in said article.

(16) Fourth:—It is ignorant of the matters and things alleged in the fourth article of said libel and can *neither* admit nor deny the same; but calls for proof.

Fifth:—It denies the truth of the matters contained in the fifth article of said libel, or that libellant is entitled to recover the sum of ten thousand dollars from this respondent by reason thereof. On the contrary, while repeating its denial of any liability whatever, it avers that in any event it would not be liable to damages in excess of the proven dependency of such dependents as said C. E. Barford may have left surviving him.

Sixth:—It denies the charge of negligence against

it made in the sixth article of said libel and in each specification thereof, and avers on the contrary that it had fulfilled its full duty to said decedent in the premises.

Seventh:—Answering the seventh article of said libel it admits the jurisdiction but denies that all and singular the premises are true.

Eighth:—And further answering this respondent says that at the time of the accident in the libel mentioned the steamship Hybert was upon the floating dry dock at the yard of Colonna's Shipyard, Incorporated, in the harbor of Norfolk, being reconditioned and put in order for services, certain employes of said shipyard being engaged in painting the vessel and others in caulking her decks, while certain of the crew of the vessel were engagd in rigging the life boats on the upper deck and getting them in shipshape condition ready for inspection. That some time during the forenoon of said day the blocks and falls to the No. 4 life boat on the port side of the upper deck of the vessel had been rigged and made fast to the davits and to the respective ends of the boat, which was then lying in the chocks on deck, and that thereafter the shipyard's caulkers, for the purpose of getting at and caulking the deck under said life boat, hoisted her in her davits and pushed her out over the side of the steamer where she had hung on the davits for some time before the accident occurred: That in the course of their duty two of the seamen some time after (17) the lunch hour went to said life boat, got in it and were engaged in re-laying the bottom-boards at a time when the chief and third mates approached and the latter of his own accord got into the boat for the purpose of obtaining its dimensions with a view to obtaining a supply, and was in the act of stooping down to get it when the after end of the boat for some cause became loosened from its fall and dropped, precipitating the decedent to the dock causing his death. Respondent further says that said boat was an iron boat, about 24 feet long, 7 feet 8 inches beam and three feet depth with a cubic capacity of 376 feet, which with its hangers was in good order and condition and properly rigged to its davits, said hangers being of standard make and in common use; that said boat had been hanging from its davits

for some time before the accident, and respondent is ignorant of the cause of its after end becoming disengaged; but, if it was due to any negligence of the members of the crew already in said boat, such negligence was that of a fellow servant for which this respondent should not be liable.

And having fully answered it prays to be hence dismissed with its reasonable costs.

THE UNITED STATES,
By H. H. RUMBLE,
Special Assistant to the Attorney
General in Admiralty.

HUGHES, LITTLE & SEAWELL,
Of Counsel.

TESTIMONY IN NARRATIVE FORM.

(18) Filed February 16, 1928.

C. A. LINDGREN, the Libellant, being duly sworn as a witness in his own behalf, testified as follows:

Direct Examination.

My name is C. A. Lindgren. I am administrator of the estate of C. E. Barford, deceased. The certificate now presented is a certificate of my qualification issued by the Clerk of the Circuit Court of the City of Norfolk.

Note: The certificate was received in evidence marked "Exhibit #1".

I qualified on January 14th. Mr. Barford was my wife's brother. My wife has been dead two years. Mr. Barford's heirs are my two children, who are eighteen and nineteen years of age. Mr. Barford lived with me. He was never married and lived with us all the time. He had no other brothers and sisters.

JOHN LUMFORD.

CROSS EXAMINATION.

Mr. Barford was about 49 years of age. I don't know how long he had been going to sea. He had been on a boat about 20 years. As a seafaring man he spent most of his time on the water. When he was ashore temporarily, he made his headquarters at my house.

RE-DIRECT EXAMINATION.

Prior to this accident, he worked for the Old Dominion Transportation Company between Norfolk and New York. He was running on the Richmond boat about fifteen—eighteen years and was transferred to the New York boat. He had been with the Old Dominion about twenty years. It was just shortly prior to his death that he left that company. This was because they laid off men because there wasn't any work to do.

(19) JOHN LUMFORD, a witness for the libellant, being duly sworn, testified as follows:

DIRECT EXAMINATION.

I worked for the Colonna Shipyard, have worked over there about twenty years. My job is leading man of the caulkers. I worked on the steamship Hybert. She was at No. 4 dock. That is a large dock. I went to work on her on the morning of October 5th, the time of this accident. The first work I did was caulking all three decks, the boat deck and both bridge decks. The boat deck is the deck where the life boats are swung. After we worked up to the life boats, there wasn't any falls on the boat. I asked the ship's officer if he would put the falls on and he did. That was about half past nine. Between 10 and 10:30 the falls were on. I asked him were they ready. He said, yes. I knew that myself because I looked at them. Then we wound the boats out so we could caulk under them. We wound them out with a lever. It's a patent davit. After the falls is on, there is a strain to the fall. You wind the lever. The davits will carry the boat off. It was between 10 and 10:30 that we swung the life boat over the side. This was the after life boat on the port side. I didn't notice

the number. We finished caulking some time the next day. We didn't finish it that day. We swung the life boat out something like 10 or 10:30. I am satisfied it was 1 o'clock or after when the accident happened. I didn't see the accident. At that time I was on the deck. I couldn't see a thing. I didn't know it was a accident until someone called my attention to it. I got permission to swing the life boat out from the ship's officer, (20) from Mr. Richards, the first officer. He said he would put the falls on the boat, see they were on, and he did put them on. I went back there again at 10 or 10:30. I asked him was they ready. He said, "Yes, wind them out". I noticed was they on right and they was on right. I don't remember whether he said anything at that time that we would have to wind them out on our own responsibility. I didn't see the accident until it was all over and I didn't finish caulking until the next day. The boat was swung out there on the davits from 10 to 10:30, something around that. When the accident was. So far as I know nobody touched it in the meantime.

CROSS EXAMINATION.

I examined the falls and things when I went to put it out. It was properly rigged. Blocks and falls appeared to be in good condition and properly hooked on. As a matter of fact I did turn it out and it stayed out there for several hours before the accident. After lunch the caulkers went up and turned to at 12:30. I got up there something around 1 o'clock, little after. I noticed there was three or four men in the boat working. What they were doing, I don't know. The boat was then in the same position in which I had left it. Hadn't been let down any. The boat must have been flush with the deck. She was off far enough for us to work that spot after she was wound off. It was necessary to move the boat in order to do the caulking under the boat and alongside of it. We have always been doing it that way. It was necessary in order to get under the boat to caulk. We swing them out and leave them hang on the davits. That is the regu- (21) lar way of doing it. I have been doing it that way for twenty years. After we got the boat swung and made

fast swinging on the davits, neither I nor any other man of Colonn'as had anything further to do with it.

RE-DIRECT EXAMINATION.

If nobody else is working I see that the boat is swung back in the rack before I leave, after I finish caulking.

Q. You, of course, don't know whether any other employee of Colonna's had anything to do with this boat. You couldn't have or you didn't see them have anything to do with it. A. Where we was working at nobody or the ship's crew or our men had any business up there.

RE-CROSS EXAMINATION.

The moving of the boat out and the moving of it back is under my direction as foreman after I get permission. The work up there had not been completed at the time of this accident. I don't know how long the men had been working in the boat when I got up there. I did notice them when I went up after lunch.

(22) CHARLES G. RICKARDS, a witness for the Libellant, being duly sworn, testified as follows:

DIRECT EXAMINATION.

I was First Officer on the steamship Hybert at the time of this accident. I had been going to sea since 1912. I hold a master's license, ocean unlimited. I was First Officer on the steamship Hybert. I knew Mr. Barford. As far as I can remember he came on duty that morning for the first time. I don't remember the date when I went on duty on the steamship, but it was the Sunday before. When she came in dock I went aboard her. Mr. Barford came on duty the morning of the accident for the first time. The other two men in the boat came on duty during that morning. All three were killed the first day they came on the steamship. Mr. Barford's wages were, I think, $125.00 a month. His job was Third Officer. We call it in that position where we are on a spot job as we call it, it was known as third assistant ship keeper. Ship under way, in commission, he would

be third officer. This ship had not yet been put in commission. The other two men were seamen. According to the tickets that were sent with those men to the ship, they were A. B.'s. The ship was in dry dock at Colonna's Shipyard. The ship is a U. S. Shipping Board vessel owned by the United States. She was in the large dry dock and she was on the ways at the time this accident occurred.

(23) On the morning of the accident Lumford asked me first if I would put the falls on the life boat that day. He told me he wanted to caulk under it. I told him, yes, we would put them on. Then he came to me again after we put the falls on and wanted to know if I was going to push the boat out. I said, "No, we have all the work we can do, that's your job". That's the very words I told him. So he went to work and pushed it out. The only rule we had on board the vessel why we didn't put the life boats over for the men, was we were just too busy to do it. That's really their job when they do it for their work. This would be life boat No. 4 if she were in commission. Port side aft. I cannot say what time the boat was swung out. I can't say the exact time when these men were placed in the boat to work, but when I went up there about quarter past one or twenty minutes past one they were in the boat at that time. Mr. Barford walked up to the boat with me at that time. He said he wanted a measurement of a rubber ball that goes in the drain in the bottom of the life boat. He and I walked to the side of the life boat together. Two men were in there at the time placing the bottom boards. Mr. Barford climbed in. He climbed into the forward end. I was standing at the forward end, leaning against the boat watching him get the ball out, leaning against the side of the life boat. She was swung out on her davits. Her keel lay about flush with the deck. She was swung out far enough for the rail to be clear the side of the ship. Just far enough to swing clear in case she was lowered. Nothing happened when Mr. Barford climbed in the boat. After he had gotten in the boat and in the bottom of it and reached for the ball, why, the boat just turned loose on the after fall and fell. The whole boat didn't fall, just one end fell. It hung on the forward end. The fall didn't part. The releasing gear must have disengaged.

(24) The boat swung down and when it did all three

men were thrown from the boat. We found them on the dry dock below. I pretty nearly fell too. I saved myself by throwing myself backward. I went down on the dock and saw the men after they fell. All three were dead. There was two on the dock and one in the water. Mr. Barford was on the dry dock itself. The release lever of the gear was in the after part of the boat. Mr. Barford was in the forward end. He was nowhere near the release gear. The two seamen were in the after end of the boat. The release gear is a pull gear with a chain. It takes some little effort to pull it. It doesn't work easily. The life boat was, I think, a 37 passenger boat. I don't know how long it would be. These life boats were removed from the vessel after the accident. They were placed down at the Army Base. I have seen them within the last few days. The life boat down at the Army Base which fell is the one that set out in the floor. The one against the wall was completely fitted up. The one on the floor was not. We had four life boats on the Hybert. We removed the two after life boats. The vessel sailed with two forward life boats. I didn't go on her. I remained in Norfolk. The forward and after life boats were not fitted with the same release gear. The forward boats were fitted with just what I would call a bar gear. Has a lever in the bottom that fastens down with a pin. The release gear in the after boats was an automatic gear. The *apprxoimate* distance from the life boat to the dock where the men fell was 50 to 60 feet. Mr. Barford was not securing this ball at my orders. I didn't order him to get the ball. Captain Young asked him to get a measurement of the hole so we could get a ball to fit, and we had already gotten a measurement (25) with a stick on one of the forward boats, and as we walked to this after boat Mr. Barford noticed a ball in this hole. He said, "There's a ball that will fit, I know, so I will get that for a measurement". That is why he went in the boat.

Mr. KELSEY: That is all.

Mr. LITTLE: I will say with respect to the boat being at the Army Base and being taken off the ship it was done under my instructions so that the boat might be available to any court or jury who might desire to examine it, there being a serious accident causing, as your

Honor has heard from the testimony, the death of three men and injuring the painted who was alongside. As a matter of precaution I got the Shipping Board to take the boat off the ship and keep it at the Army Base where it could be seen by a court or jury if it was so desired at the proper time.

(26) This ship has been up at Camp Eustis, out of commission. And was at Colonna's Shipyard at the time of this accident being made ready for sea. And in the doing of that on the morning of this accident we had the boats rigged for inspection by the inspectors. The blocks and falls of No. 4 life boat had been properly rigged before she was hauled out by Lumford. The blocks and falls were in good condition. And the davits were in good condition. And the releasing gear and everything was O. K. as far as I could see. The blocks and falls were properly rigged to the releasing gear—the boat would not hang on that if it wasn't properly fastened. It is a fact that in order to release gear in the ordinary process you have to pull a chain in order to trip the lever. The men in the boat had nothing to do with the releasing chain. The chain or rope that holds the boat and that is attached to the cleat is an automatic releasing gear altogether. It is hooked into an eye bolt on the fall. The releasing gear is attached to the boat (or bolt). I do not know the make of the releasing gear. The releasing gear is a part of the boat itself. The falls are rove through the blocks and one block is put up near the davit. And the other block has a ring bolt in it that hooks in the hook of the releasing gear. The boat when lowered to the water is lowered by means of the falls from the deck. When it hits the water by means of this particular releasing gear, it is released by pulling the chain. The sailors had nothing to do with pulling the chain at the time of the accident. We could not see from where we were what caused the release of the boat. There was no warning of any kind. It just simply snapped and fell. I had all I could do to keep from falling with it. I didn't see any of the men hit
(27) anything or do anything. At the time it fell I was looking down in the bottom at the forward end. I wasn't looking aft at all. It snapped so quick I didn't have a chance to see what became of the men. I throwed

myself backwards and fell on the deck myself. There isn't anything unusual in my experience as an officer of the ship in hanging a boat on the falls on the davits and putting it outboard. It is a very usual and ordinary thing to do. There isn't anything unusual in men going to work in a boat which is hanging on falls. I have done it myself more than once.

RE-DIRECT EXAMINATION.

If a release gear on these boats is pulled both ends are disengaged. They are all connected with one chain. That chain runs around under the seat. When the boat is swung out its equilibrium is maintained because it is hung from both ends. The release gear works on one lever from the inside of the boat. But the lowering gear—it has to be lowered from two falls to get it to the water. It is the same old style lowering gear. It is simply the releasing gear that is automatic. The boat is held at a certain position if you want to lower it from one deck to another deck with falls on to the cleats on the davits. When the boat is first swung out it requires two men, one at the forward end and one at the after end. In order to hold the boat in the particular position in which it is then, in the first place when you rig your falls up you make them fast—pull them up as taut as you can get them and make them fast to the cleat on the davit. Then it has a worm gear to roll the boat out. (28) As you turn this lever on each end that shoves the boat out at the same time holding it off the deck. The boat is lowered by the falls from the deck, one man at each fall. When you have gotten it to the position at which you want to hold it, it is fastened to a cleat on the davit. They are on the deck any where you want to fasten it. The running end of the fall is fastened. It is a rope. He ties the rope to a cleat, just as in the old way.

RE-CROSS EXAMINATION.

No part of the blocks and falls had given way or become loose at the time of this accident. They had been made fast—the end of the fall—to the cleat and stayed in that position. It was something in connection with

the releasing gear in that boat which released the boat and let the end of it fall. There is a ring at the bottom of the falls through which a hook goes and the hook which goes through that ring is a part of the releasing gear.

(29) WILLIAM G. LARMOUR, a witness for the libellant, being duly sworn, testified as follows:

Mr. KELSEY: Counsel for respondents has agreed that if we called Mr. Calcott, a mechanical engineer, that he would testify that he made a drawing of this gear and that this print is a blue print of that drawing. That the blue print marked "Boat fall release as installed on after boats S. S. 'Hybert'" is the drawing referred to.

NOTE: Blue print of release gear was received in evidence and marked "Exhibit 2".

DIRECT EXAMINATION.

I am connected with the Old Dominion Marine Railway at Norfolk. My position there is manager. I have been Manager of that railway for 11 years. I started in shipbuilding and transportation in 1887 and have been at it ever since. I am 57 years old. I have been connected with the Grand Trunk Railway; Detroit Dry Dock Company; Norfolk Southern Railway. My position with the Norfolk Southern was Marine Superintendent. With the Norfolk Marine Railway and with the Old Dominion Marine Railway. I examined the life boat and life boat releasing gear on the life boat sitting in the center of the warehouse away from the wall in the warehouse at the Army Base. That was the boat that was pointed out to me as the life boat which fell from the steamship "Hybert". I made a rough drawing and took measurements of the release device. The blue print handed me marked "Boat fall release as installed on after boats S. S. Hybert" is a correct drawing of that device. That device is known to be the Broady release gear. I inspected (30) it with the idea of determining whether or not it was in good condition or properly installed. I found out with reference to the installation of the device that the

counter weight ball as shown on this drawing for the purpose of bringing the release gear back into locking position fouled a thwart or seat in the boat. That thwart had been cut out to allow that ball to drop back into its position, but it was not at the center line of the gear and it fouled it on the port side. So it didn't allow the ball to drop back. The particular release gear I am speaking of is the after release gear of this life boat. The way that ball fouled it and the effect it had when it fouled that seat was, the ball is pivoted on this part of the release gear. This ball is a counter weight to carry this part of the gear back and throw this part back in position so these three pins are supposed to come in line and form a lock. It is a toggle gear. When these pins are not in line it makes a hair trigger and that is about what the trouble with the gear was. The way it was adjusted, the way I see it, it was actually a hair trigger and as sensitive as any spring trap that ever could be devised. In the description of the patent it specifically states that these three pins are to be in line. I found them out of line. You can understand what I mean by a toggle gear by doing a little kindergarten work. The ball is connected here. That puts a strain on this connection. It is opposed by this pin. These are stationery pins. These plates are fastened to the stem of the boat. These shown in green are movable. They fly in releasing position as shown here. Then the hook capsizes and turn everything loose. The counter weight goes up to that position. Here is the chain by which the gear is released—pull chain. When it is engaged it is coiled around that quadrant. When it is released the whole thing flies around (31) as shown here. Assuming those pins were not in alignment but were out of alignment as is indicated on this drawing, that is to say, the red pin was not in alignment with the two green pins marked 9a and 12, I can only show you how that would have the effect of capsizing the hook so as to release that. Suppose your finger was the line of these pins. One knuckle joint is this joint. Here is the pressure underneath. As long as your finger is straight up and down and in line like those pins are supposed to be it won't turn over. The minute you get it out of line, you get that. The least bit off that line. This pin travels on a radius on that line and comes out in this direction. Travels from that point

to that. Swings around a radius on that center. After I discovered the hair trigger device, I tried it just with the pressure of my hand. That is all I could do with that, with the ball engaged on the thwart as I tried to show where the ball fouled the thwart. You could release the pin then by pressure of the hand. The ball I speak of is this counter weight. The seat was cut out—a half circular opening cut in the seat, but it was off center so the port side of the ball fouled the seat; it didn't drop down in the opening it was cut for. But the gear had more or less play and by forcing it over you could force it down so the gear would come more nearly in line and then you couldn't lift it. With the ball naturally tripping and fouling that seat you could release the gear. In that position there would not be enough strength there to sustain a great deal of weight. The thwart in my opinion looked as if it might have been a special thwart put in there to carry the sheave underneath. Through which this release chain was passed. It looked as if this thwart had been put in for the purpose of carrying (32) the sheave through which the releasing chain passed to connect with this gear. I couldn't say for certain that is the case. This thwart was not a part of the after seat. There was a tank—an air tank—right forward of that. There was a short thwart just in the peak of the boat there. I am not sure whether that thwart was on the same level with the after seat or not. It looked to me as if it had been placed in there after the boat had been built. It was built that way to accommodate this sheave. That lifeboat was unseaworthy with the device I found installed in there to the extent that it wasn't in proper shape to be loaded with passengers because it would likely dump the passengers out as in this case. So far as the boat itself was concerned, the boat looked to be perfectly seaworthy. This device doesn't lock unless the ball goes all the way down. The thwart, as I have already mentioned, which was in the after part of this life boat would foul this gear—keep it from—the ball from dropping all the way down and locking the device. If the release handle of that gear had been pulled it would have released both ends at the same time. I could not state whether or not, by merely taking a casual glance, the ball had fallen all the way and the device was locked.

ERNEST POSEY.

CROSS EXAMINATION.

I have never worked one of those gears. If the counter weight ball was against the port side of that aperture in the thwart it would make a hair trigger effect in the releasing gear. Under the conditions I found it in, it would trip at once. You could trip it with your finger under those conditions. I found the boat lying on its side there at the Army Base. It was listing to the port side. I made my examination, I think, last Thurs-
(33) day or Friday. Friday, I think. The Friday of this past week. If you took this counter weight ball and put it through the slot, it wouldn't fall naturally into position. You had to force it over and there was enough slack in the gear so you could force it down in the opening. The other end was on the same list and that was perfectly all right. But this one had an accident. If you drop the ball—counter weight—through this aperture to the thwart—through this semi-circular opening in the thwart, it would go down so it would lock the gear. If the ball was up against the port side of that aperture and made a hair trigger action, the hook wouldn't hold the weight, unless the gear had been out of use for a long time and possibly was corroded and stuck. I saw nothing of that condition when I examined it. As to the hair trigger situation, there is no telling just what position those three pins were in at the time of the accident. They may have been so nearly in line they would have carried a considerable weight until something disturbed the boat possibly the added weight and a little shift may have touched it off. To look at it with everything in proper condition those pins should all three be in line before that gear would lock. I say that from the interference of this seat in the life boat the device was so influenced that ordinarily the fall of the ball would not put the pins in direct line. I found the ball worked clear of the thwart in the other end of the boat. It was not fouled in the after end.

(34) ERNEST POSEY, a witness for the libellant, being duly sworn, testified as follows:

DIRECT EXAMINATION.

I am a master mariner. I hold license for any waters. I have been going to sea since 1912. Have been

master mariner since 1919. For two years I had a vessel that carried passengers as well as freight. I have been master of only Shipping Board vessels. I am United States Shipping Commissioner at Norfolk. I went with Mr. Kelsey to examine the releasing gear of a life boat at the Army Base—this life boat was situated away from the wall of the warehouse. There were two life boats there—one was against the wall completely fitted and the other out from the wall not fitted up. I examined the after release gear of that life boat. As to the condition I found it in, there seemed to be a lot of lateral play in the ball making it possible to move it laterally a good deal further than the other ball. Which may—would account for the fact it may have fouled that thwart which was situated closer to the ball in the after end than the forward thwart was to the forward end. In view of the fact that this ball fouled the thwart and the fact there was play in it, there would be great probability of the device fouling that thwart because the ball couldn't fall in a perpendicular position if it in any way rubbed against that thwart. The effect that would have on the device would be if it didn't fall in a perpendicular position it wouldn't be locked. If it was not locked and the boat swung out over the side, the boat would disengage and fall. If it was not locked, it wouldn't hold at all. I worked it down there in different positions. I found if it was just off the perpendicular a few degrees it would (35) catch and probably hold the weight until there was some joggling about the boat. Then it would disengage. I found at one angle nearly perpendicular it would hold weight. The device itself is all right—it is approved by the steamship inspection service. It's been tested and approved and if it is properly installed and in good working order it will work to hold the boat. Its proper performance was affected by the interference of that thwart and the fact there was too much play in the counter-balancing ball. May be the bushing was gone in the sheave; allows it to play back and forth. The thwart was too close and it would rub on the side of the thwart and hang probably. The ball is about as big as your hand. The opening in the thwart is large enough to permit it to pass. It seems some time it has given trouble before. It is cut out bigger than the one in the forward end. You can see where there are chisen marks where they

cut it out. That ball may have worked perfectly a hundred times and one time it would drag against that thwart and hang. Just that much play in it would allow it to do that. I have seen that device installed in other vessels. It does not always have to go through a hole in the seat in the boat, not unless that thwart up there forms the brace in the bow of the boat. Most boats are not constructed that way, not necessary to have that brace in the bow. If that case it would have nothing to interfere with it at all. It wouldn't be good judgment to install it so close to a thwart that it may foul a thwart—wouldn't be good judgment to put a thwart that close to a ball. I believe if that thwart had been put back, I mean forward, away from it, a few inches that device would have been all clear. These life boats are usually used in the roughtest kind of weather you have at sea. They are tested by the local inspectors and must be lowered with a full complement of passengers, 37 people on board, and they are liable to be lowered in heavy sea. That device wouldn't hold if not in working order. One end would trip. It must stand the roughest kind of use because it get the roughest kind of use.

CROSS EXAMINATION.

I examined this boat about a week ago, possibly ten days. It has the same style of releasing gear in both ends. The other boat alongside of it has the same style of releasing gear. Both boats are made exactly alike. These boats are a usual type of life boats for steamers. If this counter weight ball caught against this thwart, it would make a hair trigger on the release. If it caught there and made this hair trigger effect, the releasing hook wouldn't hold any weight. I tested the position of that ball in several positions and found a few degrees anywhere off the perpendicular it would engage and hold that steady weight, but any play—any steady jarring—would disengage it. I brought that out a moment ago. That is my theory, but I tested it in different positions. The fact that this particular boat fell made it evident that something gave way. I went down to determine in my own mind just what did give way. After eliminating everything else—(interrupted). That is the conclusion I came to. I am morally certain it is correct. If the

releasing gear was a certain angle off the perpendicular it would hang there. If it had been in perpendicular it would have held. It is the Broady releasing gear. It is one of the standing releasing gears and was in general (37) use some seven or eight years ago when these life boats were built. It is one of the approved style, by the steamboat inspection service. Aside from the fact that it had a thwart which it might strike as the counter weight ball went down and the fact there was some little play in the counter weight the thing was in good order and condition.

RE-DIRECT EXAMINATION.

I examined the other thwart in the same boat. That thwart was farther away from the device and there wasn't so much lateral play in the ball. The bushing was good. Referring again to this after device, I don't recall that there was anything on the ball itself to indicate it might have fouled that thwart. But I do recall noticing some chisel marks on the thwart, where they dug it out. It evidently fouled before and some one chiseled it larger. If it falls perpendicular it will hold. In practice aboard ship, I don't know if I had been in command of that boat—I would just give that device a casual glance unless I were familiar with that boat and knew it was not absolutely perpendicular. Then I would have put my hand on it and forced it perpendicular. The fact that it fell and eliminating everything else indicates it was not perpendicular. That is my surmise.

Libellant rests.

(38) CHARLES G. RICKARDS, recalled as a witness for the respondents, testified as follows:

DIRECT EXAMINATION.

I am familiar with this Broady releasing gear. I have seen similar gear a number of times . At the time the No. 4 boat on the "Hybert" was rigged the rigging and falls and releasing gear were in good order, properly rigged. I can't say whether or not it is a fact that the counter weight ball on this releasing gear would go

through this—go by this opening in the thwart. I never noticed. If it went through and went down it would lock the gear. My experience has been with them unless they are absolutely right they won't hold any weight. Just as soon as you lifted the boat they fall. The fact that it would hang on the davits two or three hours would indicate to my mind that it was properly hung the first place. In my experience I have never had one fall like that. I have never seen one that was not hooked by reason of the fact that the ball would not fall on the perpendicular. I have seen them not hooked for reasons of being corroded, such as that. But then if it was hung by the falls, on hoisting, putting a strain on it, the boat would fall. It wouldn't hold any weight unless it was hooked. I have seen them installed just exactly the same as this boat; but all life boats have an after and forward thwart on top of the air tank more or less to brace the body and protect the tank. In some cases the thwart will come towards the end of the boat more than others. In that case they cut out a half moon shape to allow the ball to drop when it is supposed to drop. Both of these boats at the Army Base are rigged that way, with thwarts (39) at the end with half moon shape holes.

O. J. YOUNG, a witness for the respondents, being duly sworn, testified as follows:

DIRECT EXAMINATION.

My name is O. J. Young and I am port captain of the Shipping Board at Norfolk, and was a year ago when this accident happened on the "Hybert". I am fairly familiar with the life boat No. 4 which was on the "Hybert" at the time of the accident. I understand that it was equipped with the Broady releasing gear. That gear has been approved for use on life boats by the steamboat inspection service. I had notice of this accident shortly after it occurred. I was on the ship at the time. I made an examination of the releasing gear on the after end of that boat probably two hours after the accident happened. I found the releasing gear on No. 4 boat at that time had been, of course, released—unhooked —and that it had splinters of wood on the hook; on the releasing hook, and some spots of red paint on the hook.

The hook itself was painted lead color. I think the hook was lead color. I examined it to ascertain what it's condition was and found it apparently in good order. Saw nothing broken. We made tests of it the next day. We made tests of this hook on this boat the next day. We found on that occasion nothing broken about the hook and that it was working free. The hook locked when the counter weight ball dropped in its proper position. I didn't observe that there was any difficulty in having that counter weight ball drop in its proper position. It wouldn't hold weight if the ball was held up in any way. The ball must be in absolute right position to hold the boat in the first place. It is intended that way. That (40) controls that trigger as I call it. If the ball wasn't in proper position it would have unhooked before the boat was off the deck. If the boat had been swung on the davits for two or three hours in the first place, and later three men were working in it, and this weight had been hung by this hook, it would indicate to my mind that everything was in good proper position. Otherwise it would have given way when they first swung the boat up. We tested this counter weight ball to determine whether or not it would fall freely through this opening in the thwart. We found it would fall freely through the opening. It didn't foul. It is hinged on a pin and there is some lateral play in that as on any rivet. It isn't as tightly set as your knife blade, for instance. There must be some play. It is natural play; it isn't bushed. It is left slack on purpose. It mustn't be tight so as to freeze. There are two pieces of metal together. I didn't notice there was any more than a normal play there, than there is on the ball at the other end of the boat. I would say if the ball catches on the thwart and doesn't go down, then the releasing gear won't hold any weight. The Hybert was built at Wilmington, N. C. Came out in 1920. And came to Norfolk in 1922 and was laid up in the James River some time during '22. She was out for two years. While in the James River the Shipping Board keeps men on the vessels to keep them in good condition. She had been maintained in fair condition as to paint. There was no corrosion on this device. The device had been painted. The boats had been painted inside and the releasing gear, of course, painted, protecting it from rust so much that we did not paint

those boats when we broke her out. We didn't need to paint them. The releasing gear worked the same on that (41) boat as on any other boat.

CROSS EXAMINATION.

It occurs to me in thinking of the colors of this hook and the boat that the boat is painted red inside, and the strips—strips of wood on the side—are painted lead color. The device is lead color, I believe. There are two different colors. Strips painted one color and the device is painted another. One is red, another lead color. When I made this test of the boat, Life boat No. 4, it was taken from the davit and landed on the deck of the lighter at Colonna's and the lighter shoved around to the other side of the pier, 2 or 3, whatever it is. The next morning—next day—a survey was made of that boat by different interested departments, salvage and Shipping Board boat inspectors and other representatives. I was there that *mroning* when they were holding the survey. I am not sure at this time that I worked that device myself right at that time. There were many there and it was being operated. I don't think that I had my hands on it the next morning. When she was on the dock, she was sitting as near as possible on an even keel. I wouldn't say whether she was sitting on an even keel that morning or not. I assume it would depend a good deal on whether a boat is on an even keel or whether she is listing, whether or not this devise would drop through the hole. Just as she is sitting there now. If the boat was listing over to the opposite side, I assume it would have a tendency to drop clear of the place it fouled. I believe we sent one of our launches up there and brought her to the base on the launch; and she was put in the warehouse and is in practically the same condition today as she was when the accident happened. Little accumulation of dust and dirt. She has been in an (42) enclosed warehouse where it is perfectly dry, and in the same condition she was in when we put her there. So far as I know there has been no change made in her condition. As to why they were inspecting this device to see whether or not it dropped through that slot, I never heard any one at the time of the survey remark about there not being play enough in the opening in the

thwart for that ball to pass through. It operated without landing on either one side or the other to attract their attention. The survey board was just as anxious as anyone to determine the cause and I believe at the time if they saw that was a reason they would have noted it and spoken about it because there were many different interested parties there and as far as I saw the ball worked through that opening without interference. To be honest, I don't know that I had my hands on it at that time or made any special investigation for that purpose.

RE-DIRECT EXAMINATION.

I was there, however, to ascertain the condition of the releasing gear and see how it worked and whether it worked. And saw that it did work. The Shipping Board maintains a Sea Service Bureau. The seamen who are engaged here by the Shipping Board are engaged through the Sea Service Bureau. A. B. Seaman have a rating.

Mr. KELSEY: I don't understand there is any question about that. Why are you bringing this out?

Mr. LITTLE: Well, you asked what rating they had.

Mr. KELSEY: There has been no denial they were A. B. seamen.

(43) JOHN LUMFORD, re-called as a witness for the respondents, testified as follows:

DIRECT EXAMINATION.

When I wound out the No. 4 life boat on the morning of this accident on the Hybert, I didn't have anything to do with the falls. I just hauled the boat out with the movement of the davits. And in order to do that the weight of the boat came upon the falls. It being pulled out from the chocks to the outside. At that time the releasing gear was in proper condition.

CROSS EXAMINATION.

I noticed the releasing gear was hung properly. When I first got there the boat was sitting in the racks.

I noticed it was hung properly before I wound it out. Otherwise I couldn't wind it out. I looked to see if the hook was through the ring. Looked at the falls, see if they were made fast properly. All I did was to see if it was hung properly. I didn't go inside that life boat and work that releasing gear; but I couldn't wind the boat out unless it was hooked properly. There is no question about the fact that the ring was in the hook when I swung the boat out. If the ring hadn't been on the hook it wouldn't have gone out.

Respondents rest.

STIPULATION OF PROCTORS APPROVING NARRATIVE OF EVIDENCE.

(44) It is stipulated and agreed by and between proctors for the respective parties that the foregoing statement of evidence in narrative form is all of the testimony before the Court in the matter of the libel of C. A. Lindgren, Administrator of the Estate of C. E. Barford, deceased, against Colonna's Shipyard, Incorporated, and United States of America, and is a true and correct statement thereof.

H. H. RUMBLE,
Special Assistant to the Attorney General,
Proctor for the United States of America, Appellant.

L. B. COX,
OAST, KELSEY & JETT,
Proctors for C. A. Lindgren, Administrator of the estate of C. E. Barford, deceased, One of the Appellees.

HENRY H. LITTLE,
Proctor for Colonna's Shipyard, Inc., One of the Appellees.

CERTIFICATE OF THE COURT AS TO THE EVIDENCE.

(45) I, D. Lawrence Groner, United States District Judge for the Eastern District of Virginia, do hereby certify that the above statement of evidence in this case in narrative form, which has been prepared and agreed

to by proctors for the respective parties, appears to be true, complete and properly prepared, and the same is hereby approved.

Given under my hand this 16th day of February, 1928.

D. LAWRENCE GRONER,
United States District Judge.

OPINION OF THE COURT.

(46) Filed October 26, 1927.

C. A. Lindgren, Administrator,
vs.
Colonna's Shipyard, Inc., and The United States of America. } In Admiralty.

I deferred a decision in this suit that I might consider the two questions which seemed to me to be decisive. First, whether the doctrine of *res ipsa loquitur* applies, and secondly, whether, irrespective of this doctrine, actionable negligence (I. E. unseaworthiness) was shown by the evidence.

It is conceded that the life boat from which deceased fell was swung over the ship's side and suspended on the ship's davits with its keel about flush with the ship's boat deck, and that deceased, in the discharge of his duties, got into the boat at a time when two other members of the crew were at work in the boat, and that shortly after he entered the boat, the line from the davit to the stern of the boat became released allowing the stern to fall throwing the men out and resulting in the death of all of them. The boat was equipped with an appliance known as the Broady Releasing Gear. This is a patented device which is intended to secure the lines with which the life boat is lowered from the deck of the vessel while in the process of lowering and to disengage the lines quickly when the life boat has reached the water. The device has been tested in use and found entirely satis-
(47) factory and no point is made that it will not accomplish its purpose with reasonable safety when properly installed in good condition and properly used. It is

not contended on part of the defense that deceased assumed the risk of injury. He had notihng to do with attaching the lines from the davits nor with the swinging of the life boat over the side of the vessel, and he was totally unfamiliar with the condition of the device or the manner of its installation since the day of the accident was his first day of work on this vessel. The life boat had hung over the side of the ship in the ordinary way and without accident to any one for at least an hour before he entered it to do the work which he was engaged in doing when the accident occurred. During all of this time two men had been working in the boat and there was nothing to put him on notice of danger. He had a right to assume as a matter of fact as well as a matter of law that the apparatus by which the life boat was held in its suspended position was in good order. The evidence taken upon the trial tends to show that at the stern of the life boat the device is installed in such a way as to require an opening about four inches square in the thwarts of the life boat which apparently were originally built in the stern of the life boat to serve about the same purpose as to strengthening the boat as a transverse bulkhead would. The purpose of the opening is to allow a counter-weight ball, which when in proper position locks the hook, which is a part of the attached appliance, to the ring in the falls or lines used to lower or lift the boat, to fall into place and thus lock the device. Two expert witnesses examined for the libellant testified that, either because the device itself was not installed in exact alignment or else because the opening was not con-
(48) structed with reference to the perpendicular fall of the ball, the counter-weight ball when thrown into action wedged against one side of the opening so that instead of the locking device completely operating and the connection between the shank lever and the hook and the extension and the link and the link and the supporting bracket being in alignment, they were out of alignment and the result was, as a witness described it, to create a sort of hair-trigger arrangement which instead of being so locked as not to be capable of being disengaged except by means of the release lever, was in condition where a sudden jar or added weight would probably disengage the ring from the hook and release the lines.

I personally inspected the life boat and there is no doubt about the fact that the stern gear is so attached as that the counter-weight ball does not fall clearly through the opening but is inclined to strike against the left-hand side and wedge in this position unless some slight power is applied to throw it fully into place. As thus suspended the locking device applied but to what extent it was impossible in the experiments made in my presence to determine since there was neither opportunity nor means at hand to apply a sudden jar (as of a person jumping into a boat) or added weight but it was obvious to all who witnessed the experiments that as thus partially locked the hook was readily released by the application of slight pressure whereas when fully locked this was not the case. The device itself, I think, was in good condition and when the counter-weight ball was thrown fully into place, in proper alignment, but on the other hand I think it reasonably clear that when not thrown into place, or when allowed to stick, the intended result was not accomplished and the completion of the locking device not consummated, and this, I think, is what must have occurred at the time of the accident for otherwise what resulted would be inexplicable, and if this be true, it seems to me necessarily to follow that the installation of the device being negligent because of the failure to install in alignment or make the opening suffi-
(40) ciently large, the device was unseaworthy, and in this view of the case, libellant is entitled to a recovery.

For this reason I have not discussed the doctrine of *res ipsa loquitur* though doubtless that doctrine, if applicable at all in determining the seaworthiness of a vessel, would apply for in this case the appliance from which the injury resulted was under the management of respondent, the United States, and the accident in the ordinary course of things would not have happened if those in charge had used proper care either in its installation or operation. The doctrine has been applied most frequently in the case of elevator accidents, and in all of such cases, the accident for which recovery was allowed was one which ordinarily would not have happened except for the lack of due care, and that condition obtains equally in this case.

I believe, however, that it is not necessary in this case to invoke this doctrine since the conclusion I have

reached meets the requirement of the law which imposes upon the person having the affirmative the duty of proing by a preponderance of the evidence that the injury was caused as the result of the failure to discharge a legal duty.

On the question of the amount of damages recoverable the case presents difficulty growing out of the fact that deceased left no dependents. He had neither father, mother, children, brothers, nor sisters, and those entitled to his estate are a niece and a nephew. Under the Merchant Marine Act, applying the rule under the Federal Employers' Liability Act, there could be no recovery since there was no dependency, but under the Virginia statute giving a recovery limited to ten thousand dollars in case of death, dependency is not a necessary condi-
(50) tion, but the probable earnings of deceased considering his age, capacity, experience, etc., may be shown. In this case deceased was in his fiftieth year and was earning one hundred and twenty-five dollars a month. Having due regard to his probable future earnings, I think it is fair under all of the circumstances to enter judgment against the United States in the sum of five thousand dollars.

The libel as against the Colonna Shipyard will be dismissed, counsel for libellant conceding at Bar that no case was made against it.

FINAL DECREE.

(51) Entered and filed October 31, 1927.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

C. A. Lindgren, Administrator of the Estate of C. E. Barford, Deceased, Libellant, v. Colonna's Shipyard, Incorporated, a corporation, and United States of America, Respondents.	In Admiralty.

This cause came on this day to be heard upon the

libel, the answers thereto of United States of America and Colonna's Shipyard, Incorporated, and the evidence adduced in open court, and was argued by proctors;

After mature consideration thereof, the Court being of the opinion, as set forth in writing and filed herewith, that the decedent's death was the result of defective installation of the releasing gear in the life boat of the Steamship "Hybert", owned by the United States of America, permitting the said life boat to fall and precipitate the decedent to the dry dock below, that the device was therefore unseaworthy, that the said C. A. Lindgren, Administrator of the Estate of C. E. Barford, Deceased, is entitled to recover from the United States of America damages under the statutes of this state providing for the maintenance of suits for damages on account of death of a person caused by the wrongful act of another, that damages for decedent's death should be fixed at the sum of Five Thousand ($5,000.00) Dollars, and that Colonna's Shipyard, Incorporated, was not responsible for the decedent's death and the libel against it as to it should be dismissed;

It is ADJUDGED, ORDERED and DECREED that C. A. Lindgren, Administrator of the Estate of C. E. Barford, deceased, do recover of and from the United States of America the sum of Five Thousand ($5,000.00) Dollars, with interest at the rate of four (4%) per cent per annum from this date until paid, and his costs in this behalf expended as taxed by the Clerk of this Court.

And it is further ORDERED that the libel filed herein be and the same is hereby dismissed as to the said Colonna's Shipyard, Incorporated, and that it recover its costs.

D. LAWRENCE GRONER,
U. S. District Judge.

Norfolk, Va.

PETITION FOR APPEAL AND ASSIGNMENT OF ERRORS.

(52) Filed January 17, 1928.

(Title omitted.)

To the Honorable D. Lawrence Groner, Judge of the Court aforesaid:

Your petitioner, United States of America, one of the respondents in the above entitled cause, respectively represents that it is aggrieved by a final decree entered herein on the 31st day of October 1927, by the District Court of the United States for the Eastern District of Virginia, at Norfolk, and petitioner assigns the following errors:

The Court erred:

(1) In over-ruling the exceptions of this respondent to the libel filed in said cause.

(2) In failing to hold that this case was and is governed by Federal statutes to the exclusion of state statutes.

(3) In failing to hold that the rights of the libellant were and are governed by the laws of the United States, namely, Section 20 of the Act of March 4, 1915, as amended by Section 33 of the Act of June 5, 1920, known as the "Merchant Marine Act, 1920", and that the remedy provided by said laws is exclusive.

(4) In failing to hold that Congress having by the aforesaid statutes and by the Act of March 30, 1920, legislated upon the subject of death by wrongful act as respects seamen and death by wrongful act upon the high seas, the remedies provided by said statutes are exclusive and state statutes purporting to give a remedy in such cases do not apply.

(5) In holding that the libellant was and is entitled to recover of and from this respondent notwithstanding the fact that the libellant's intestate, the said C. A. Barford, left no widow, children, parents, next of kin, or other person dependent upon the said intestate.

(6) In holding that in order to recover, it was not necessary that libellant allege and prove that his said intestate left any such person dependent upon said intestate.

(7) In entering judgment against the United States of America in favor of libellant.

WHEREFORE, for these and other errors, apparent upon the face of the record, petitioner hereby appeals from the whole of said decree to the United States Cir-
(53) cuit Court of Appeals for the Fourth Circuit; and prays that the same, together with a full transcript of the record may be sent to the said Court without delay and that said Court will proceed to hear said cause; that said decree may be reversed and a decree entered dismissing the said libel and that petitioner may have all such other, further and general relief as in law and justice it may be entitled to receive.

UNITED STATES OF AMERICA,
By H. H. RUMBLE,
Special Assistant to the Attorney General.

STIPULATION AS TO PRINTING OF THE RECORD.

(54) Filed February 18, 1928.

It is stipulated and agreed by and between proctors for the respective parties that the Clerk of the United States District Court for the Eastern District of Virginia shall make up the transcript of the record in this case in accordance with the stipulation of the proctors and transmit the same to the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, to be

printed under the supervision of the Clerk of that Court in accordance with Rule Twenty-three.

H. H. RUMBLE,
Special Assistant to the Attorney General,
Proctor for the United States of America, Appellant.

L. B. COX,
OAST, KELSEY & JETT,
Proctors for C. A. Lindgren, Administrator of the estate of C. E. Barford, deceased, One of the Appellees.

HENRY H. LITTLE,
Proctor for Colonna's Shipyard, Inc., One of the Appellees.

STIPULATION OF COUNSEL AS TO THE CONTENTS OF THE RECORD.

(55) Filed February 18, 1928.

(Title omitted.)

It is stipulated and agreed between proctors for the respective parties that the record in this case upon appeal shall consist of the following:

(1) The libel of C. A. Lindgren, Administrator of the estate of C. E. Barford, deceased, with interrogatories thereto attached.

(2) The exceptions filed on behalf of the United States of America to the said libel.

(3) The order overruling said exceptions.

(4) The answer of the United States of America to said libel.

(5) The separate answer of Colonna's Shipyard, Incorporated, to the said libel.

(6) The evidence in narrative form and the exhibits therewith to be sent up as originals.

(7) The opinion of the Court.

(8) The final decree and all other orders in the cause.

(56) (9) The petition for an appeal, assignments of errors, order allowing the appeal, and all other appeal papers.

H. H. RUMBLE,
Special Assistant to the Attorney General,
Proctor for the United States of America, Appellant.
L. B. COX,
OAST, KELSEY & JETT,
Proctors for C. A. Lindgren, Administrator of the estate of C. E. Barford, deceased, One of the Appellees.
HENRY H. LITTLE,
Proctor for Colonna's Shipyard, Inc., One of the Appellees.

MEMORANDUM OF ORIGINAL PAPERS ACCOMPANYING TRANSCRIPT OF RECORD.

(57) 1. Petition for appeal filed January 17, 1928.

2. Order allowing appeal entered January 17, 1928.

3. Citation. Legal service accepted.

CERTIFICATE OF THE CLERK.

(58) UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

I, Joseph P. Brady, Clerk of the District Court of the United States for the Eastern District of Virginia, do hereby certify that the foregoing is a full and true transcript of the proceedings and judgment of said Court, as stipulated by counsel, in the above entitled cause.

In testimony whereof, I hereunto set my hand and affix the seal of said Court, at Norfolk, in said District, this 22nd day of February, A. D. 1928.

JOSEPH P. BRADY,
Clerk, U. S. District Court.
By PAUL R. FLANAGAN,
Deputy Clerk.

(Seal)

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 2719.

United States of America, Appellant,

versus

C. A. Lindgren, Administrator of the Estate of C. E. Barford, deceased, and Colonna's Shipyard, Inc., a corp., Appellees.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk.

February 24, 1928, the transcript of record is filed and the cause docketed.

Same day, the original exhibits (Blue prints) are certified up.

Same day, the original petition for appeal, order allowing appeal and citation are certified up under Sec. 7 of Rule 14.

Same day, the appearance of Paul W. Kear, United States Attorney, and H. H. Rumble, Special Assistant to the Attorney General, is entered for the appellant.

March 2, 1928, the appearance of D. Arthur Kelsey and L. B. Cox is entered for the appellee C. A. Lindgren, Administrator, etc.

March 16, 1928, twenty-five copies of the printed record are filed.

March 20, 1928, stipulation of counsel as to the time for the filing of their respective briefs is filed.

STIPULATION THAT NO CLAIM OF ERROR WILL BE ASSERTED AGAINST APPELLEE COLONNA'S SHIPYARD, INCORPORATED.

Filed March 20, 1928.

(Style of Court and Title Omitted.)

It is stipulated and agreed between counsel for the respective parties that upon this appeal no claim of error in the decree of the District Court insofar as the defendant, Colonna's Shipyard, Incorporated, is concerned, will be asserted, and that it will not be necessary for Colonna's Shipyard, Incorporated, to file any brief in connection with such appeal.

H. H. RUMBLE,
Attorney for United Sfates.
L. B. COX,
KELSEY & JETT,
Proctor for Lindgren, Administrator.
HENRY H. LITTLE,
Proctor for Colonna's Shipyard, Inc.

ARGUMENT OF CAUSE.

May 2, 1928, (April term, 1928,) cause came on to be heard before Waddill, Parker and Northcott, Circuit Judges, and is argued by counsel and submitted.

OPINION.

Filed October 16, 1928.

UNITED STATES CIRCUIT COURT OF APPEALS

FOURTH CIRCUIT.

No. 2719.

United States of America, Appellant,

versus

C. A. Lindgren, Administrator of the Estate of C. E. Barford, deceased, and Colonna's Shipyard, Inc., a corp., Appellees.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk.

(Argued May 2, 1928. Decided October 16, 1928.)

Before WADDILL, PARKER and NORTHCOTT, Circuit Judges.

ARTHUR M. BOAL, Admiralty Counsel, U. S. Shipping BOARD (PAUL W. KEAR, U. S. Attorney, and H. H. RUMBLE, Special Assistant in Admiralty to the Attorney General, on brief) for Appellant, and D. ARTHUR KELSEY and L. B. Cox (KELSEY & JETT on brief) for Appellees.

PARKER, Circuit Judge:

This is an appeal from a decree in Admiralty in favor of the Administrator of one C. E. Barford and against the United States as owner of the Steamship Hybert, one of the Shipping Board vessels. The suit was commenced by libel *in personam* filed under the Suits in Admiralty Act, to recover damages for the death of Barford. The libel alleged that decedent was a seaman employed as third mate on the Hybert and that his death was caused by the negligence of the officers and employees of the government who had the vessel in charge. There was no allegation, however, that decedent left surviving him any widow or children or parent or next of kin dependent upon him or that the suit was instituted in behalf of such dependents. An exception was filed to the libel because of the lack of such allegation; and, upon the exception being overruled, it was established upon the hearing that decedent left no dependents and recovery was opposed because of that fact. The District Judge was of opinion, however, that libelant was entitled to recover under the Virginia death statute (Section 5786 of the Code of Virginia); and, as dependency is not required for recovery thereunder, he entered a decree for libelant. No question is raised, on the one hand as to the death of decedent having been caused by the negligence alleged or, on the other, as to his having left no dependents. The question in the case is whether his administrator is entitled to recover under the statute of Virginia, which does not require a showing of dependency, or whether the right of recovery given by the Merchant Marine Act of 1920 in cases of wrongful death (41 Stat. 1007, 46 U. S. C. A. 688) is exclusive.

There can be no question that, prior to the passage of the Act of 1920, the Virginia Statute would have been applicable. Prior to that act there was no liability for wrongful death under the general maritime law, Con-

gress had not legislated upon the subject, and, in the absence of legislation by Congress, Courts of Admiralty applied the death statutes prescribed by states where death occurred. *Great Lakes Dredge & Dock Co.* v. *Kierejewski*, 261 U. S. 479; *Western Fuel Co.* v. *Garcia*, 257 U. S. 233; *Lewis* v. *Jones* (C. C. A. 4th), 27 Fed. (2d) 72; *The Anglo-Patagonian* (C. C. A. 4th), 235 Fed. 92. It is clear that so long as Congress had not exercised the power given it under the Commerce Clause of the Constitution to legislate with respect to the liability in such cases, the states might occupy the field; but it is equally clear that as soon as Congress acted the legislation of the states was superseded and that of Congress became supreme and exclusive. *Cooley* v. *Board of Wardens of Port of Philadelphia*, 12 Howard 298, 317, *et seq.*; *County of Mobile* v. *Kimball*, 102 U. S. 691, 698-699; *Morgan* v. *Louisiana*, 118 U. S. 455, 464; *Smith* v. *Alabama*, 124 U. S. 465, 473; *Second Employers' Liability Cases*, 223 U. S. 1, 54. As was said by Mr. Justice Matthews in *Smith* v. *Albama*:

"The grant of power to Congress in the Constitution to regulate commerce with foreign nations and among the several States, it is conceded, is paramount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the States. It follows that any legislation of a State, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority."

The situation with respect to the right of recovery in cases such as this is exactly the same as in cases arising out of the death of railway employees while engaged in interstate commerce. Prior to the enactment of the Federal Employers Liability Act, Congress had left the question of the liability of employers in such cases to be determined by the laws of the several states; but upon

the passage of that act it was held that all state laws and rules upon the subject were superseded and that the rights of parties with relation thereto were to be determined solely by reference to the Federal Act. *Second Employers' Liability Cases, supra; Mich. Cent. R. Co.* v. *Vreeland*, 227 U. S. 59; *Gulf, Etc., R. Co.* v. *McGinnis*, 228 U. S. 173; *N. C. R. Co.* v. *Zachary*, 232 U. S. 248, 256; *S. A. L. Ry.* v. *Horton*, 233 U. S. 492. In the *Second Employers' Liability Cases*, Mr. Justice Van Devanter said:

"True, prior to the present act the laws of the several States were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employes while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the States in the absence of action by Congress. * * * The inaction of Congress, however, in no wise affected its power over the subject. * * * And now that Congress has acted, the laws of the States, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is."

The Merchant Marine Act of 1920 covered fully the right of the personal representative of a seaman to recover from his employer for personal injury resulting in death. Section 33 of that act (41 Stat. 1007, 46 U. S. C. A. 688) provides:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in

such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

As will be seen, the effect of this act was to incorporate into the maritime law the statute applying to injuries to railway employees engaged in interstate commerce. The constitutionality of the statute was upheld in *Panama R. Co.* v. *Johnson*, 264 U. S. 375, and it was there interpreted as modifying the substantive maritime law so that the rights thereby conferred might be enforced either in a court of admiralty or in a court of law. Answering an argument that the statute was invalid because it restricted the enforcement of the rights conferred to actions at law and thereby encroached upon the admiralty jurisdiction Mr. Justice Van Devanter, speaking for the Court, said that if such an interpretation were placed upon the statute a grave question would arise as to its constitutional validity, and that it should be interpreted as meaning that the injured seaman should have the benefit of the new rules if he sued on the admiralty side of the court as well as if he had sued at law. He said:

"The course of legislation, as exemplified in section 9 of the Judiciary Act of 1789, sections 563 (par. 8) and 711 (par. 3) of the Revised Statutes, and sections 24 (par. 3) and 256 (par. 3) of the Judicial Code, always has been to recognize the admiralty jurisdiction as open to the adjudication of all maritime cases as a matter of course, and to permit a resort to common-law remedies through appropriate proceedings *in personam* as a matter of admissible grace. It therefore is reasonable to believe that, had Congress intended by this statute to withdraw rights of action founded on the new rules from the admiralty jurisdiction and to make them cognizable only on the common-law side of the courts, it would have expressed

that intention in terms benefitting such a pronounced departure,—that is to say, in terms unmistakably manifesting a purpose to make the resort to common-law remedies compulsory, and not merely permissible. But this was not done. On the contrary, the terms of the statute in this regard are not imperative but permissive. It says 'may maintain' an action at law 'with the right of trial by jury', the import of which is that the injured seaman is permitted, but not required, to proceed on the common law side of the court with a trial by jury as an incident. The words 'in such action' in the succeeding clause are all that are troublesome. But we do not regard them as meaning that the seaman may have the benefit of the new rules if he sues on the law side of the court, but not if he sues on the admiralty side. Such a distinction would be so unreasonable that we are unwilling to attribute to Congress a purpose to make it. A more reasonable view, consistent with the spirit and purpose of the statute as a whole, is that the words are used in the sense of 'an action to recover damages for such injuries', the emphasis being on the object of the suit rather than the jurisdiction in which it is brought."

The statute which was thus incorporated into the maritime law and which conferred upon the injured seaman, or his representative if his injuries resulted in death, rights which might be enforced either in an action at law or a suit in admiralty, clearly provides that there can be a recovery in case of death only where there is a showing of dependency. 35 Stat. 65; *Gulf, etc., R. Co.* v. *McGinnis, supra; N. C. R. Co.* v. *Zachary, supra.* And, in the light of the authorities cited above, we think that the statute must be deemed exclusive and to supersede all state legislation bearing upon the subject.

It is said that the injured seaman is given an election to proceed either under the old law or under the statute. This is correct when it is understood as meaning that the election is to proceed under the old maritime law or under the statute. See *Plamals v. The Pinar Del Rio,* 48 Sup. Ct. 457. But it does not follow from this that the personal representative of a seaman may re-

cover for wrongful death under a state death statute merely because prior to the Merchant Marine Act the state statute was applied by courts of admiralty in the absence of any other law to apply. Such statutes were not a part of the general maritime law, they were recognized only because Congress had not legislated on the subject, and, as shown above, as soon as Congress did legislate, the remedy which it prescribed became the exclusive remedy. When it is said that the injured employee may proceed under the old law, it is meant that he may invoke the rules of the maritime law as to wages, maintenance and cure (264 U. S. at 391), not that he may invoke state statutes covering a field which has been entered by Congress, and which prior to the act of Congress were enforced by courts of admiralty only because Congress had not entered the field. It is unthinkable that Congress should have intended that in addition to the rule prescribed by the Merchant Marine Act the parties should be subjected to the rules prescribed by the legislatures of the forty-eight states.

Since, therefore, libelant cannot recover for the death of the deceased seaman under the Virginia death statute, but must proceed under the Merchant Marine Act of 1920 making applicable the provisions of the Federal Employers' Liability Act, and since dependency must be shown as a condition to recovery thereunder and it is admitted that deceased left no dependents, it is clear that the libel should have been dismissed.

The point is made that the Merchant Marine Act has no application because it is said that decedent was not a seaman but a mere shipkeeper of a ship out of commission. It was alleged in the libel, however, and admitted in the answer that at the time of his death decedent "was engaged in his duties as third mate and as such a seaman on said steamship." There was nothing anywhere in the pleadings contradictory of this allegation; and no amendment was asked or allowed. It

would seem, therefore, that decedent's status as a seaman for the purposes of the suit was conclusively determined. *Wigmore on Evidence* (2nd Ed.), Vol. 2, p. 536. But if we ignore the pleadings and look only to the evidence, there can be no question as to decedent's status as a seaman within the meaning of the Merchant Marine Act. The Hybert had been laid up, it is true, but sometime prior to the death of decedent she had been taken to the dry dock and was undergoing repairs preparatory to a voyage. Decedent was employed as third officer and came on duty for the first time on the morning of his death. At the time he received the fatal injury he was engaged in preparing the vessel for sea.

A seaman was defined by Congress in the Act of June 7, 1872, as any person employed or engaged to serve on board a vessel. R. S. 4612, U. S. C. A. 713. And in construing the Merchant Marine Act here under consideration the Supreme Court has held stevedores to be seamen within the meaning of the act because engaged in maritime service formerly rendered by the ship's crew. *International Stevedoring Co.* v. *Haverty,* 272 U. S. 50. In that case the Court said:

"We cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship. The policy of the statute is directed to the safety of the men and to treating compensation for injuries to them as properly part of the cost of the business. If they should be protected in the one case they should be in the other."

Certainly seamen employed to take a ship to sea who are engaged in making her ready for the voyage are not to be denied the status of seamen and the benefit of the act merely because the vessel is not commissioned at the time. See *The Progresso,* 46 Fed. 292; *The William Leishear,* 21 Fed. (2d) 862. In this case the appli-

cation of the act happens not to be beneficial to the representative of the seaman; but of course its applicability is not to be determined by that circumstance.

Our conclusion is that the decree below should be reversed and the libel dismissed.

Reversed.

DECREE.

Filed and Entered October 19, 1928.

UNITED STATES CIRCUIT COURT OF APPEALS

FOURTH CIRCUIT.

No. 2719.

United States of America, Appellant,

vs.

C. A. Lindgren, Administrator of the Estate of C. E. Barford, deceased, and Colonna's Shipyard, Inc., a corp., Appellees.

Appeal from the District Court of the United States for the Eastern District of Virginia.

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Virginia, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court, in this cause, be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the Eastern District of Virginia, at Norfolk, with directions to dismiss the libel.

JOHN J. PARKER,
U. S. Circuit Judge.

October 19, 1928.

On another day, to-wit, November 19, 1928, the mandate of this Court in this cause is issued and transmitted to the U. S. District Court at Norfolk, Va., in due form.

Same day, the original exhibit (Blue Print) is returned to the Clerk at Norfolk, Va.

Same day, the original petition for appeal and order allowing appeal are returned to the Clerk at Norfolk, Va.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled cause, as the same remain among the records and files of the said Circuit Court of Appeals.

IN TESTIMONY WHEREOF, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 5th day of January, A. D., 1929.

(Seal of Court)

CLAUDE M. DEAN,
Clerk, U. S. Circuit Court of Appeals, Fourth Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 25, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for ths Fourth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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No. 25

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

C. A. LINDGREN, ADMINISTRATOR OF THE ESTATE OF C. E. BARFORD, DECEASED,
PETITIONER,

v.

UNITED STATES OF AMERICA AND COLONNA'S SHIPYARD, INCORPORATED,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

JACOB L. MOREWITZ,
L. B. COX,
D. ARTHUR KELSEY,
R. ARTHUR JETT,
Counsel for Petitioner.

C. A. Lindgren, p. p.

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PETITION FOR WRIT OF CERTIORARI.

May it please the Court:

The petition of C. A. Lindgren, Administrator of the estate of C. E. Barford, deceased, respectfully shows to this Honorable Court:

A. SUMMARY STATEMENT OF THE MATTERS INVOLVED.

(1) The matter involved is the right of the personal representative of a deceased seaman to recover indemnity under the old maritime rules on the ground that the injuries—resulting in death—were occasioned by the unseaworthiness of the vessel upon which he was employed at the time of the accident and have the damages assessed under the death by wrongful act statute of the state wherein the accident and death occurred.

(2) Whether or not, under the facts in this case, Section 33 of the Merchant Marine Act of 1920 (U. S. Code 46, Sec. 688), provides an *exclusive* remedy for death by wrongful act as respects seamen.

B. REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) Because the Circuit Court of Appeals for the Fourth Circuit has decided an important question of general law in a way probably untenable or in conflict with the weight of authority.

(2) Because the Circuit Court of Appeals for the Fourth Circuit has decided an important question of Federal law which has not been, but should be, settled by this Court.

(3) Because the Circuit Court of Appeals for the Fourth Circuit has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Fourth Circuit should be granted.

JACOB L. MOREWITZ,
L. B. COX,
D. ARTHUR KELSEY,
R. ARTHUR JETT,
Counsel for Petitioner.

Supreme Court of the United States

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I. THE OPINIONS OF THE COURTS BELOW.

The opinion in the Circuit Court of Appeals for the Fourth Circuit, was rendered on October 16th, 1928, and is to be found in the advance sheets of the Federal Reporter, Vol. 28, Fed. (2d Series), page 725, the question involved being succinctly stated at page 726. This opinion is also to be found on page 45, *et seq.*, of the transcript of record, and the decision of the District Court appears at page 34, *et seq.*

II. JURISDICTION.

(1) The date of the decree to be reviewed is October 19th, 1928, and will be found upon page 55 of the record.

Grounds of This Court's Jurisdiction.

(2) This case involves an important question of maritime law heretofore not definitely decided by this Court, which, for the information of the bench and bar of this country, should be determined.

(3) Construction of Section 33 of the Act of June 5th, 1920, known as the Merchant Marine Act of 1920 (U. S. Code 46, Sec. 688).

III. STATEMENT OF THE CASE.

On October 5th, 1926, the petitioner's decedent was engaged as third assistant shipkeeper (record, p. 17), on the steamship "Hybert", a merchant vessel owned by the United States of America, then in the drydock of Colonna's Shipyard, Incorporated, at Norfolk, where she was being repaired.

The petitioner's decedent having been ordered to secure the measurements of a rubber ball which fits in the drain in the bottom of the life boats, climbed into life boat #4, which at the time was swinging on the vessel's davits over the port side aft, and suspended over the drydock. While in the bottom of the boat for this purpose, the after tackle, due to its defective condition, became disengaged, the life boat swung downward alongside the ship, threw to the drydock below the petitioner's decedent, and two other seamen who were also working in the boat. The petitioner's decedent was instantly killed.

A libel was filed in the United States District Court at Norfolk, against the United States of America, under the Suits in Admiralty Act, and against Colonna's Shipyard, Incorporated. At the conclusion of the trial both the petitioner and the United States conceded (R. 37, 44), that there was no liability upon the shipyard and the libel as to it was dismissed. The Court then found (record, p. 34) that life boat #4 was unseaworthy in that

it was defectively installed and that decedent's estate was entitled to recover; that his heirs were a niece and a nephew who were not dependents; that the action was instituted under the Virginia Death Statute providing a recovery limited to $10,000.00 in case of death, dependency not being a necessary condition, and that in view of the decedent's age, capacity, experience and earnings, his administrator was entitled to recover from the United States the sum of $5,000.00 as damages for his death.

No exception was taken to the District Court's conclusions (record, p. 39) that the vessel was unseaworthy or as to the amount of recovery, but an appeal was taken upon the sole ground that Section 33 of the Act of June 5th, 1920, (U. S. Code 46, Sec. 688), known as the Merchant Marine Act, and the Act of March 30th, 1920 (U. S. Code 46, Secs. 761-768), known as the High Seas Death Act, provide an exclusive remedy for death by wrongful act as respects seamen, and that the state statutes do not apply, and, as decedent had no dependents there could be no recovery.

Petitioner, on the other hand, contended that he had the right as personal representative of the decedent to invoke the old maritime rules on the ground that the vessel was unseaworthy, and apply the Virginia Death Statute (Sec. 5786, Virginia Code 1924), which had been always fully recognized in that field, and also took the position that decedent was not in fact a seaman at the time of the accident. As to the latter question, the Court of Appeals held that the decedent was a seaman. Accordingly, the petitioner, for the purpose of obtaining a final determination by this Court of the questions presented herein, concedes that the decedent was a seaman and brings his application to this Court under the Seamen's Act of July 1st, 1918, C. 113, Sec. 1 (U. S. Code 28, Sec. 837), allowing seamen to sue and appeal without prepayment or security for costs, and/or by virtue of the provisions of the Act of July 27th, 1922 (28 U. S. Code,

Sec. 832), under which this cause was prosecuted in the Courts below. See Order entered on January 7th, 1929, by Senior Circuit Judge Waddill, a certified copy of which has been lodged with the Clerk of this Court.

Upon the first question involved, the Circuit Court of Appeals held that the petitioner was not entitled to recover under the Death Statute of Virginia, and that the right of recovery given seamen by the Merchant Marine Act of 1920, in cases of wrongful death is *exclusive* (the High Seas Death Act not being applicable), and that it is necessary to show dependency, to which ruling the petitioner now applies to this Court for a review.

IV. SPECIFICATION OF ERRORS.

(1) The Circuit Court of Appeals erred in finding and holding that the petitioner did not have the right as a personal representative of the deceased seaman to recover indemnity under the old maritime rules on the ground that the injuries were occasioned by the unseaworthiness of the vessel upon which he was employed at the time of the accident and have his damages assessed under the death statute of the state wherein the accident and death occurred.

(2) The Circuit Court of Appeals erred in finding and holding that the petitioner could only proceed under Section 33 of the Merchant Marine Act of 1920, making applicable the provisions of the Federal Employers' Liability Act.

(3) The Circuit Court of Appeals erred in not finding and holding that while dependency must be shown as a condition of recovery under Section 33 of the Merchant Marine Act of 1920, nevertheless, the petitioner had the right to proceed under the old maritime rules on the ground of unseaworthiness of the vessel, and as there was no Federal Death Statute occupying that field, his right included the remedy of applying the Virginia Death Statute, which does not require a showing of dependency.

V. ARGUMENT.

(1) Summary of Argument.

Point 1. Petitioner respectfully submits that the Circuit Court of Appeals has confused the remedy afforded seamen with the right of the alternative measures of relief, in that it has held that the remedy given by the alternate right of proceeding under Section 33 extinguishes entirely the right given the seamen to recover indemnity under the old rules on the ground that the death of the seaman was occasioned by unseaworthiness.

Point 2. The decision of the Circuit Court of Appeals denies absolutely to the personal representative of the seaman the right to recover on the ground of unseaworthiness, except possibly such instances where the suit may be brought under the High Seas Death Statute.

Point 3. The Circuit Court of Appeals plainly misconstrues the decision of this Court in *Plamals* v. *The Pinar Del Rio*, 277 U. S. 151, as meaning that the election to proceed under the old maritime law is limited to a recovery of wages, maintenance and cure and does not embrace a recovery of indemnity for unseaworthiness, either for injuries or death.

Point 4. The Circuit Court of Appeals in its consideration of Section 33, places a construction thereon which restricts the rights of seamen to recover for the shipowner's breach of contract,—i. e., to provide a seaworthy vessel—when the whole history of this section, and the original act of Congress which it amends, shows that it was passed as an enlargement of their rights and not as a contraction.

Point 5. The personal representative of the seaman has the right to proceed under the old rule and as there is no Federal death statute occupying that field, he can apply the death statute of the state in

which the accident occurred. In the case at bar the Virginia Death Statute furnished a complete remedy for recovery of damages for death under the old maritime rules.

Point 6. *Northern Coal & Dock Co., et als.*, v. *Emma Strand, et als.*, #41 of the October Term, 1928, 73 L. ed. (Adv. Op.) 99, decided December 10th, 1928, is distinguishable from the case at bar, in that a State Compensation Act was sought to be enforced in the cited case where a longshoreman was killed by reason of his fellow-employee's negligence, while engaged in an essential maritime occupation on board a vessel lying in navigable waters, in which situation Section 33, was the only possible basis of relief. In the instant case the shipowner's violation of its contract to provide a seaworthy vessel gave the seaman or his personal representative the *election* to proceed under the old admiralty rules with the right to libel the ship *in rem* as well as the owner *in personam*, in which event he must go much further in his proof than is necessary under Section 33, or he may accept the new remedy provided by Section 33, with its accompanying burdens.

(2) Discussion of Points.

(a) *Point 1.*

An injured seaman, or in case of death, his personal representative has, by virtue of Section 33 of the Act of June 5th, 1920, a clearly defined new right with a clearly defined remedy.

The old maritime law gives to seamen no right to recover indemnity for injuries sustained through the negligence of the master or any member of the crew, but does give a right of recovery, *in rem* as well as *in personam*, in consequence of unseaworthiness of the ship and her appliances (*The Osceola*, 189 U. S. 158), and in case of death, the death statute of the state in which

the accident occurred, provided such a statute existed, has been unquestionably applied, even where a liability *in rem* was imposed, though none existed in the admiralty, itself. (*Western Fuel Company* v. *Garcia,* 257 U. S. 233; *Anglo Patagonian* (C. C. A. 4th), 235 Fed. 92, *certiorari denied,* 242 U. S. 636. The latter right, which is more difficult of proof, involves no question of contributory negligence or the negligence of a fellow servant, but is based entirely upon a failure of the owner to furnish a seaworthy vessel and appliances, in violation of the implied contract imposed under the admiralty law. The alternate rights, therefore, are two separate and distinct rights, and the remedies given are two separate and distinct remedies. Petitioner insists, therefore, that the remedy afforded by the new right cannot extinguish either the old right or the remedy given by the old right.

(b) *Point 2.*

The conclusion reached by the Circuit Court of Appeals was that as Congress has now passed the Merchant Marine Act of 1920, embracing Section 33, that this legislation was exclusive and supersedes all other law upon the subject so far as are concerned the rights of a personal representative of a seaman to recover from his employer for personal injuries resulting in death. A number of decisions are cited to support this conclusion, the most recent and far reaching of which is the decision of this Court in *Second Employer's Liability Cases,* 223 U. S. 1. By reference to page 55 of the opinion in the case cited, it will be seen that the extent to which this Court went was to hold that now "Congress has acted, the laws of the states, in so far as they cover the same field, are superseded". Obviously, only such laws of the states dealing with employees engaged in interstate commerce, were affected. But the case at bar deals with an entirely different, distinct and independent field from

that covered by the statute, namely, the right under the old maritime law to sue and recover in admiralty either *in rem* or *in personam* indemnity for injuries resulting in death, where the same were due to the unseaworthiness of the vessel or her appliances.

As there is no Federal death statute covering such field, except the High Seas Death Statute, which is inapplicable in this case, the personal representative then has the unquestioned right in the absence of legislation by Congress, to apply the death statute prescribed by the state wherein death occurred. It is submitted that this Court clearly recognizes that there are two separate rights with two separate remedies operating in two separate and distinct fields when it uses this language in the case of *Pacific Steamship Company, Petitioner*, v. *Carl G. Peterson*, #49 of the October Term, 1928, 73 L. ed. (Adv. Op.) 91, decided November 26th, 1928:

> "The right to recover compensatory damages under the new rule for injuries caused by negligence is, however, alternative of the right to recover indemnity under the old rules on the ground that the injuries were occasioned by unseaworthiness; and it is between these two inconsistent remedies for an injury both grounded on tort that we think an election is to be made under the maritime law as modified by the statute."
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> • • • • • • • • • •
>
> "And we conclude that the alternative measures of relief accorded him, between which he is given an election, are merely the right under the new rule to recover compensatory damages for injuries caused by negligence and the right under the old rules to recover indemnity for injuries occasioned by unseaworthiness;" • • •.

Any other construction placed upon the new rule based upon the statute and the old rule based upon the

old maritime law, would deny to the personal representative of the seaman the right to recover on the ground of unseaworthiness, unless the action could be maintained under the High Seas Death Statute.

The decision (R. 48), of the Court of Appeals, however, expressly holds that:

> "The Merchant Marine Act of 1920 covered fully the right of the personal representative of a seaman to recover from his employer for personal injury resulting in death."

Accordingly, the effect of this determination is that the High Seas Death Statute (U. S. Code 46, Secs. 761-768), passed on March 30th, 1920, during the same session that Section 33 (U. S. Code 46, Sec. 688), of the Act of June 5th, 1920, was enacted, is stricken down, along with all State Death Statutes, despite the fact that Congress has consistently manifested its purpose to *further* ameliorate the condition of seamen. *Compare* U. S. Code, Title 46; Chap. 21, Secs. 761-768, (wherein the said High Seas Death Statute was re-enacted, as a subsequent, separate and distinct chapter, under the *same* Title as said Section 33), with Section 33 of the Act of June 5th, 1920, which was re-enacted in said Code as Title 46; Chap. 18, Sec. 688.

(c) *Point 3.*

The Circuit Court of Appeals admits (R. 50-51), that this Court, in the case of *Plamals* v. *Pinar Del Rio, supra,* holds that there remains an election to proceed under the old maritime law or under the statute, but in the construction of this court's opinion it limits the election under the old maritime rules to the right of a claim for wages, maintenance and cure, in line with the shipowner's unsuccessful contentions in *Pacific S. S. Co.* v. *Peterson, supra.* This Court, in *The Pinar Del Rio,* said at page 156:

> "The section under consideration does not undertake to impose liability on the ship itself, but by positive words indicates a contrary purpose. Seamen may invoke at their election the relief accorded by the old rules against the ship or that provided by the new against the employer. But they may not have the benefit of both."

It is submitted that this Court says nothing there to indicate that the seamen under the old rules are now limited to a recovery for wages, maintenance and cure only, but, on the contrary, the natural conclusion to be reached from the language used in that there are separate and distinct rights, each operating in its own separate and distinct field. Indeed this Court has specifically held this to be true in the *Pacific S. S. Co. Case, supra.*

(d) *Point 4.*

In *Panama Railroad Company* v. *Johnson*, 264 U. S. 375, 388, it was held:

> "Rightly understood, the statute neither withdraws injuries to seamen from the reach and operation of the maritime law, nor enables the seaman to do so. On the contrary, it brings into that law new rules drawn from another system and extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules or that provided by the new rules."

If the seaman's old rights are withdrawn from him, he is faced in a large number of cases with an almost insurmountable barrier to suit, because under the new statute, an *in personam* action can only be commenced in the district in which the defendant employer resides or in which its principal office is located. To deny a lien *in rem* against the vessel, itself, *The Pinar Del Rio, supra*, and nevertheless require the personal representative of a seaman receiving injuries resulting in his

death to travel possibly half around the world, to institute suit in the district in which the employer resides or has his principal place of business, and most likely when all the plaintiff's witnesses are unobtainable, is certainly an exaction far different from the intention of Congress when it gave to seamen new and additional benefits not recognized or given by the old maritime rules.

To make the personal representative bring his suit under the new statute only would in effect award the alternative to the person from whom redress is sought rather than the one seeking redress. At the same time the latter will be compelled to relinquish the right to enforce the lien, which, under the old admiralty rules, is imposed upon the offending vessel whose unseaworthiness causes death by wrongful act.

The incongruity of the holding below is made manifest when it is considered that if Colonna's Shipyard (the respondent with whom the instant decedent had no contractual relations), had been held liable, a recovery against it would have been allowed to stand. Compare *The Anglo-Patagonian, supra, Lewis* v. *Jones* (C. C. A. 4th), 27 F. (2d) 72, certiorari denied October 22nd, 1928, 73 L. ed. (Adv. Op.) 83. On the other hand, the respondent owner, who assumed the duty of providing decedent a seaworthy vessel—after having been found remiss in this duty—is permitted to escape all liability for his breach of contract.

(c) *Point 5.*

It is submitted that the personal representative had an unquestioned right in the case at bar to proceed as he did under the old maritime rules on the ground that the death of his decedent was the result of injuries received by reason of the unseaworthiness of the vessel's appliances. Upon the evidence submitted, the learned Judge of the District Court unhesitatingly held he was

entitled to recover (R. 34-37), and since there was no Federal statute occupying the field in which the suit was brought, the Court applied the Virginia Death Statute (Sec. 5786, Virginia Code 1924), which by its terms entitled the representative of the decedent to maintain an action to recover damages for death by wrongful act. As it has never at any time been contended that it was necessary to show actual dependency or that the decedent's small niece and nephew were not entitled to recover as his heirs, if this statute is applicable, petitioner will not take the time of the Court to discuss this phase of the case.

(f) *Point 6.*

This Court, in *Northern Coal & Dock Company* v. *Strand, supra,* said:

> "We think it necessarily follows from former decisions that by the Merchant Marine Act—a measure of general application—Congress provided a method under which the widow of Strand might secure damages resulting from his death, and that no State Statute can provide any other or different one. See *Patrone* v. *Howlett,* 237 N. Y. 394."

Inasmuch as the decedents in both of the above cases were stevedores, it is obvious that, but for Section 33 of the Merchant Marine Act of 1920, as construed in *International Stevedore Co.* v. *Haverty,* 272 U. S. 50, 52, they could not have been considered in the category of seamen. Manifestly, neither of them, like the present decedent, was in a position to demand maintenance and cure, if he had not been killed, nor could their personal representatives recover for their respective deaths, in the absence of some negligent act of their employers. Indeed, even under Section 33, the defense of assumption of risk was still open to the employers of Strand

and Howlett, while, as against the personal representative of the instant decedent, assumption of risk would not be a bar. *Panama* v. *Johnson, supra.*

In *Patrone* v. *Howlett, supra,* the New York Court of Appeals merely had before it the question:

> "whether the court properly instructed the jury that the rule of comparative negligence was applicable to the action"

in a situation where the personal representative of the deceased stevedore would have been barred from recovering any damages if the New York statute was held to be in force, because of the stevedore's contributory negligence. It was accordingly held that the plaintiff:

> "did not have a remedy under the state act after the Jones Act occupied the field and became a part of the general maritime law" • • •

The precise question presented in the instant case never having been squarely before this Court for decision, the above quoted statement in the *Northern Coal & Dock Company Case,* as suggested in a similar connection in *Pacific Steamship Company* v. *Peterson, supra,* can hardly be considered more than, 73 L. Ed. (Adv. Op.) 91, at 93:

> "at the most a general expression respecting a particular as to which no question was raised—no allowance for maintenance, cure and wages [or *indemnity* under the old rules, as in the instant case] being there involved—which ought not to control the judgment in a subsequent suit when the very point is presented for decision, • • •, or to prevent the determination as an original question of the proper construction of the statute in that particular. See *U. S.* v. *Corbett,* 215 U. S. 233, 239." (Language in brackets added.)

VI. CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the judgment of the United States Circuit Court of Appeals for the Fourth Circuit, reversing the judgment of the United States District Court for the Eastern District of Virginia, may be corrected, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the said Circuit Court of Appeals and finally reverse it.

JACOB L. MOREWITZ,
L. B. COX,
R. ARTHUR KELSEY,
R. ARTHUR JETT,
Counsel for Petitioner.

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BRIEF FOR PETITIONER.

I. *In Support of the Petitioner's Motion to Increase the Amount of Damages.*

The maximum amount of damages recoverable under the Virginia Statute is the sum of Ten Thousand ($10,000.00) Dollars, regardless of whether or not there be a showing of dependency. The Court in this case permitted a recovery on behalf of the administrator in the sum of only Five Thousand ($5,000.00) Dollars. It is manifestly an inadequate amount in view of the station,

age, experience and earning capacity of the decedent. He was forty-nine years of age, an officer of the ship and holding a license as such. It is true that at the time he met his death he was receiving wages of only One Hundred Twenty-five ($125.00) Dollars per month, but this was due largely to the fact that the crew of the vessel was engaged in preparing her for sea and as soon as her complement of officers had been made up he would have received higher wages.

Under the decisions of this Court, beginning with *The Ariadne,* 13 Wall. 475, and lately re-emphasized in *Standard Oil Company* v. *Southern Pacific Company,* 268 U. S. 146, we think this Court unquestionably may increase the amount of damages for the death of this decedent to a sum commensurate with the loss sustained by his heirs by reason of his death. In the recent case, decided by the District Court for the Southern District of New York, *In the Matter of the Petition of Clyde Steamship Company,* for limitation of liability, *The Inca,* 16 F. (2d) 930, *affirmed,* 18 F. (2d) 1015, *certiorari denied,* 275 U. S. 557, a recovery for the death of an officer of a ship in the sum of Twenty-five Thousand ($25,000.00) Dollars was allowed, and we submit that, in the case at bar, for this Court to increase the damages to the maximum amount of Ten Thousand ($10,000.00) Dollars, would be but a small recovery for the death of this decedent.

In the case of *The Munsey, Drowne* v. *Great Lakes Transit Corp.* (CCA 2nd) 5 F. (2d) 58, on the shipowner's appeal, in admiralty, a $13,500.00 death award was increased to $15,000.00, the full amount sued for. The Court of Appeals there held on this point:

> "We must take note of juries' awards of compensation as some guide to control us in the decision of this question of fact," citing *The Spokane,* (CCA2nd) 294 Fed. 242, *certiorari denied,* 264 U. S. 583, where a personal injury allowance was like-

wise increased from $8,000.00 to $15,000.00, and *The Ariadne, supra.*

II. *In Support of the Petitioner's Right to Maintain This Action.*

Counsel for petitioner had concluded that they would entirely rely upon the brief filed with their petition for a writ of *certiorari* in presenting this case to the Court, but since the writ was granted on February 25th, 1929, Mr. Chief Justice Taft, on April 8th, 1929, handed down the opinion of this Court in the case of *London Guarantee and Accident Company, Ltd.*, v. *Industrial Accident Commission of the State of California, et al.*, 279 U. S. 109, which we think is favorable to the petitioner's contention and we believe calls for a discussion more in detail of the first point made in the brief in support of the petition for a writ.

It was conceded by counsel for the United States in their argument of this case in the United States Circuit Court of Appeals, and also in their brief (p. 5) opposing the allowance of the writ herein, that the State Death Statutes applied in cases of personal injury resulting in death of seamen prior to legislation on the subject by Congress. [*Western Fuel Company* v. *Garcia*, 257 U. S. 233; *Great Lakes D. & D. Company* v. *Kierejewski*, 261 U. S. 479; *U. S. S. B. E. F. Corp.* v. *Greenwald*, (CCA 2nd) 16 F. (2d) 948]. Accordingly it is only necessary for us to discuss what effect, if any, Section 33 of the Merchant Marine Act of 1920, U S. C. Title 46, Sec. 688, may have had upon the old admiralty rules existing prior to the passage of that Act.

(1) *The History of Section 33.*

Section 33 was an amendment of Section 20 of the La Follette Seamen's Act of March 4, 1915. This Court, in discussing the constitutionality of this section in the

case of *Panama Railroad Company* v. *Johnson,* 264 U. S., 375, says at page 389:

> "As originally enacted Section 20 was part of an act, the declared purpose of which was 'to promote the welfare of American seamen'. It then provided that in suits to recover damages for personal injuries 'seamen having command shall not be held to be fellow servants with those under their authority' and in *Chelentis* v. *Luckenbach Steamship Company, supra,* this Court treated it as a part of the maritime laws, but held it did not disclose a purpose 'to impose on ship owners the same measure of liability for injuries suffered by the crew while at sea as the common law prescribes for employers in respect of their employees on shore'. After that decisions the section was re-enacted in the amended form hereinbefore set forth as part of an act, the express object of which was 'to provide for the promotion and maintenance of the American merchant marine."

Compare with the above the cases of *O'Hara* v. *Luckenbach S. S. Company,* 269 U. S. 364, 367; *International Stevedoring Company* v. *Haverty,* 272 U. S. 50, 52; *Encarnacion* v. *Jamison,* (N. Y. St. Ct. Ap.,—July 11 1929), 1929 A. M. C., application for *certiorari* submitted to this Court on October 7, 1929, *sub-nom. Jamison* v. *Encarnacion,* No. 390 of the October Term, 1929.

We think, in the light of its judicial history, it can not be questioned that Section 33 was intended as an enlargement of the rights and remedies of seamen and not in limitation.

(2) *Construction of Section 33.*

In determining this question we find the decisions of the lower courts of little benefit, tending to confuse rather than to offer a clear determination of the question. Several of the New York State courts take the view that Section 33 supersedes all state death statutes involving seamen, and that suits to recover for injuries

resulting in death must be brought thereunder, while the federal courts in the *Kierejewski Case, supra,* in 280 Fed. 125; *The Samnanger* (1924), 298 Fed. 620, and *The Pioneer, Standard Oil Company of New Jersey* v. *Devries* (CCA 3rd), 3 F. (2d) 852, recognize the right of the seaman to sue under the old maritime rules on the ground that the vessel was unseaworthy and permit his personal representative to recover under the appropriate state death statute. On the other hand, the District Court for the Southern District of New York in the case of *Geislinger* v. *International Mercantile Marine Company* (1924), 295 Fed 176, held that Section 33 did not apply to suits in admiralty at all, relying upon the decision of *The Bouker* (CCA 2nd), 241 Fed. 831.

Under Section 33, the injured seaman, or in case of death, his personal representative, *may maintain* an action at law for damages with the right of trial by jury and in such action all statutes of the United States conferring or regulating the right of action for death in case of railway employees shall be applicable.

Turning to Section 1 of the Federal Employers' Liability Act of April 22nd, 1908, (Chapter 149, 35 Stat. 65, U. S C. Title 45, Sec. 51), it is seen that this section provides that the employer shall be liable in damages "for such injury or death resulting in whole or in part from the *negligence* of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its *negligence* in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

In order for there to be a recovery thereunder, there must be negligence on the part of the railroad company or on the part of some employee, *San Antonio etc. R. Co.* v. *Wagner,* 241 U. S. 476; *Southern Railway Co.* v. *Gray,* 241 U S. 333, and instructions to the jury in such cases which make the railroad company liable for defects, if such defects are not attributable to the negligence of the company or its servants, are erroneous, *Seaboard*

Air Line Railway Co. v. *Horton*, 233 U. S. 492 This negligence is further defined as such acts of commission or omission as by rule of common law be sufficient to entitle the case to be submitted to a jury. *Brundege* v. *Chicago B. & Q. R. Co.* (1926 Ill.), 154 N. E. 433.

It will be seen then that the right of action in such cases is based upon and springs entirely from the negligence of the railroad company, or its employees.

Turning to the decision of this Court in *The Osceola*, 189 U. S. 158, which is the leading case establishing the right of seamen to recover for the unseaworthiness of the vessel, we find this right of recovery to be defined at page 175 as follows:

> "That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship."

And Mr. Justice Brown, in discussing this right of recovery, says:

> "It will be observed in these cases that a departure has been made from the Continental Codes in allowing an indemnity beyond the expense of maintenance and cure in cases arising from unseaworthiness. This departure originated in England in the merchants' shipping act of 1876, above quoted (*Couch* v. *Steel*, 3 El. & Bl. 402; *Hedley* v. *Pinkney & Sons' S. S. Co.*, 7 Asp. M. L. Cas. 135 (1894) A. C. 222), and in this country, in a general consensus of opinion among the Circuit and District Courts, that an exception should be made from the general principle before obtaining, in favor of seamen suffering injury through the unseaworthiness of the vessel We are not disposed to disturb so wholesome a doctrine by any contrary decision of our own."

It is apparent, then, that as a matter of contract, the

owner is required to furnish a seaworthy vessel just as much as he is required to furnish wages, maintenance and cure in the event a seaman is injured in the course of his employment, and if the seaman's injury was due to the unseaworthiness of the vessel he is entitled to recover compensation therefor.

Judge Neterer, in the case of *Lorang* v. *Alaska Steamship Company* (1924), 298 Fed., p. 547, in dealing with questions analogous to that before the Court, defines rights as the legal consequences which apply to certain facts, and remedies as the mode prescribed by law to enforce such a right. Accordingly, a seaman has two separate and distinct rights, first, the right to sue for personal injuries resulting in death caused by the negligence of his employer, either in the form of a negligent act of commission or an act of omission. The remedy provided by the section in question for such right is an action at law with a trial by jury, or else an *in personam* suit in admiralty. See *Panama Railroad Company* v. *Johnson, supra; Plamals* v. *The Pinar del Rio,* 277 U. S. 151. Second, the right to sue for personal injuries resulting in death caused by the unseaworthiness of the ship or a failure to supply and keep in order the proper appliances appurtenant to the ship. This Court has prescribed the remedy in such instances to be an *in personam* action against the owner, either at law or in admiralty, in which the right of recovery is fixed by the death statute of the state wherein death occurred, or a libel *in rem,* provided the death statute of such state allowed such an *in rem* action to be maintained. Compare *Western Fuel Company* v. *Garcia* and *Great Lakes D. & D. Company* v. *Kierejewski, supra; The Corsair,* 145 U. S. 335; *The Hamilton,* 207 U. S. 398; *The Anglo-Patagonian* (CCA 4th), 235 Fed. 92, *certiorari* denied 241 U. S. 636; *Lewis* v. *Jones* (CCA 4th), 27 F. (2d) 72, *certiorari* denied October 22nd, 1928, 73 L. Ed. (Adv. Op.) 83. We then have two distinct rights and two dis-

tinct remedies, which are governed by entirely different rules of liability, and pleading, and even of trial. They are alternate rights, with separate and distinct remedies

Counsel for the Government, in the argument of this case before the Circuit Court of Appeals, relied largely upon the decision of this Court in the case of *Baltimore Steamship Company* v. *Phillips*, 274 U. S. 316, which is not in any way decisive of the question now before the court. We think, on the other hand, it recognizes the two alternate rights as this Court there decided that where a seaman brings a suit in admiralty for injuries alleging the use of defective appliances and subsequently brings a suit at law under Section 33 of the Merchant Marine Act of 1920 for the same injuries alleging negligent operation of appliances by fellow servants, he can be entitled to but one recovery since there was but one actionable wrong. There can be but one actionable wrong in any case. If he pursues a remedy based upon a right which the facts do not support, he has had his day in court and he can not complain if he failed to pursue the remedy and right which the facts support. This Court, in the case cited nowhere says he could not select the right and remedy first pursued, but does say that having selected and pursued the alternate remedy given for such right, he is bound thereby.

(3) *Personal Representative of Deceased Seaman May Recover Under Old Rules.*

We consider the following recent decisions show that in its many opinions determining the applicability of the Industrial Compensation Statutes to admiralty causes of action, this Court recognizes an exception in the case of seamen who bring their actions by libels *in personam* or *in rem*, on the ground of unseaworthiness as established by the old maritime rules, and permits them to recover under the appropriate state death statutes. Mr. Chief

Justice Taft, in the case of *London Guarantee & Accident Company, Ltd.*, v. *The Industrial Accident Commission of the State of California, et al., supra,* discusses the line of decisions in which this Court has refused to permit state Industrial Compensation Acts to encroach upon the admiralty jurisdiction, and says, page 119:

> "Another class of cases is illustrated by *Western Fuel Company* v. *Garcia,* 257 U. S. 233. There a stevedore was killed while at work in the hold of a vessel under charter to the fuel company. The Workmen's Compensation Commission granted an award to the widow and children. This was annulled by the state court and then the widow and children brought a suit in admiralty against the fuel company in the District Court of the United States alleging death by negligence and prayed for damages The District Court was held to have jurisdiction in admiralty under *La Bourgogne,* 210 U. S. 95; *American Steamboat Company* v. *Chase,* 16 Wall. 531; *The Hamilton,* 207 U. S. 398. The plaintiff was defeated in the admiralty suit by application of the state statute of limitations. The court thus recognized a well established exception to the non-application of state statutes to admiralty jurisdiction, which is when they give a common law remedy for death by wrongful act. But this court in the *Knickerbock Ice Company case* decided that it could not extend the saving clause of Section 256 to include an award under the state workmen's compensation act. Such cases as the *Garcia case, supra; Northern Coal & Dock Company* v. *Strand,* 278 U. S. 142, and *Great Lakes Dock Company* v. *Kierejewski,* 261 U. S. 479, are therefore hardly to be regarded as real exceptions to the exclusive jurisdiction of admiralty by Section 356."

Northern Coal & Dock Company v. *Strand, supra,* it should be noted, was the chief reliance of counsel for the Government in their brief (pp. 5-6) opposing the issuance of a *certiorari* herein.

In the case of *Western Fuel Company* v. *Garcia, supra,* the action was an admiralty suit *in personam,* and the court there held at page 242:

> "As the logical result of prior decisions we think it follows that where death upon such waters follows from a maritime tort committed on navigable waters within a state whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel *in personam* for the damages sustained by those to whom such right is given."

The opinion in this case was handed down by Mr. Justice McReynolds on December 5th, 1921, nearly eighteen months after the passage of the act The High Seas Death Act, approved March 30th, 1920, 41 Stat. 537 (U. S. C. Title 46, Sec. 761), is referred to by the court as not covering the cause of action, and it is to be presumed that if the court considered Section 33 as in any way infringing upon the right of the plaintiff to maintain his action, some reference would have been made to it, although the plaintiff was a stevedore and not a seaman. We think the decision of this court *In Re*: East River Towing Company, Inc.—*The Edward*—266 U. S. 355, also recognizes an exception of petitioner's case. Mr Justice Holmes, in delivering the opinion, and after recognizing the growing considerations for the claims of labor and the suggestion that enlistment of seamen needs to be encouraged equally with the building of ships, and in answering the question of whether or not this section has impliedly repealed the statute regarding the limitation of liability of ship owners so far as claims or suits based on personal injuries to or death of seamen are concerned, says at page 368:

> "The wholesale adoption of the law for railroads above mentioned must be taken as an adoption of principles not as a basis for meticulous discovery

of conflict with an established system in matters of detail. The choice of a jury trial is given when things take their ordinary course, not to break in upon the settled mode of adjustment when the ship is given up."

III. *Conclusion.*

As above stated, this brief is supplementary to the brief accompanying the petition for a writ of certiorari and is made necessary, we think, by the recent decision of this Court above referred to. The brief submitted with the petition for writ is relied upon in support of all of the points there made.

We respectfully submit that the petitioner has the right to maintain his action in the form he has pursued; that the judgment of the United States District Court for the Eastern District of Virginia, allowing him a recovery on the ground of unseaworthiness was clearly right, but that the amount of damages allowed by the District Court was inadequate; that the judgment of the United States Circuit Court of Appeals for the Fourth Circuit should be reversed, and that this Court should enter judgment for the petitioner for damages in the sum of at least Ten Thousand ($10,000.00) Dollars.

Respectfully,

JACOB L. MOREWITZ,
L. B. COX,
D. ARTHUR KELSEY,
R. ARTHUR JETT,
Counsel for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1929.

No. 25.

C. A. LINDGREN, ADMINISTRATOR OF THE ESTATE OF C. E. BARFORD, DECEASED,
PETITIONER,

v.

UNITED STATES OF AMERICA, AND COLONNA'S SHIPYARD, INCORPORATED,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

MOTION FOR INCREASE OF DAMAGES.

JACOB L. MOSKOWITZ,
L. B. COX,
D. ARTHUR KELSEY,
R. ARTHUR JETT,
Counsel for Petitioner.

Supreme Court of the United States

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UNITED STATES OF AMERICA, AND COLONNA'S SHIPYARD, INCORPORATED,
RESPONDENTS.

MOTION FOR INCREASE OF DAMAGES.

Now comes Petitioner, C. A. Lindgren, Administrator of the Estate of C. E. Barford, Deceased, and respectfully moves this Honorable Court to increase to the sum of Ten Thousand ($10,000.00) Dollars, the amount of damages fixed by the decree in the above case of the District Court of the United States for the Eastern District of Virginia, at Norfolk, in the sum of Five Thousand ($5,000.00) Dollars, for the death of the said C. E. Barford, Deceased, on the ground that the damages as fixed by the said District Court were insufficient and inadequate in consideration of the station, age, experience and earning capacity of the said decedent.

JACOB L. MOREWITZ,
L. B. COX,
D. ARTHUR KELSEY,
R. ARTHUR JETT,
Counsel for Petitioner.

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No. 25

In the Supreme Court of the United States

OCTOBER TERM, 1928

C. A. LINDGREN, ADMINISTRATOR OF THE ESTATE OF C. E. BARFORD, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

U.S. GOVERNMENT PRINTING OFFICE: 1929

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 629

C. A. LINDGREN, ADMINISTRATOR OF THE ESTATE OF C. E. Barford, Deceased, petitioner

v.

UNITED STATES OF AMERICA ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Virginia is not reported but is found at pages 34–37 of the Record. The Circuit Court of Appeals reversed the District Court in an opinion reported in 28 F. (2d) 725. (R. 45–53.)

JURISDICTION

The judgment of the Circuit Court of Appeals for the Fourth Circuit was entered on October 19, 1928. (R. 55.) Petition for certiorari was filed January 15, 1929. Jurisdiction is conferred upon

this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

THE QUESTION PRESENTED

The single question presented is whether the personal representative of a deceased seaman who left no dependents is entitled to recover damages for the death of his decedent, incurred through fault of the officers in charge of the Government vessel, under the statute of the State of Virginia, which does not require a showing of dependency, or whether the right to recovery given by the Jones Act (Section 33, Merchant Marine Act, 1920, c. 250, 41 Stat. 988, 1007, U. S. C., Title 46, Sec. 688), which does require a showing of dependency, is exclusive.

THE STATUTES INVOLVED

Section 33 of the Merchant Marine Act of 1920 (c. 250, 41 Stat. 988, 1007; U. S. C., Title 46, Sec. 688) provides:

> That section 20 of such Act of March 4, 1915, be, and is, amended to read as follows:
>
> "SEC. 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such per-

sonal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The Federal Employers' Liability Act of April 22, 1908 (c. 149, 35 Stat. 65; U. S. C. Title 45, Sec. 51), provides, in Section 1:

> That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such car-

rier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

STATEMENT

The administrator filed a libel, by authority of the Suits in Admiralty Act of March 9, 1920 (c. 95, 41 Stat. 525; U. S. C., Title 46, Section 741 et seq.), to recover damages for the death of his decedent through the negligence of the officers of the Government vessel *Hybert*. Exception was filed to the libel because it did not allege that the decedent left surviving him any widow or children or parents or next of kin dependent upon him, or that the suit was instituted in behalf of such dependents. (R. 10.) Although it was established that the decedent left no dependents, the District Judge was of the opinion that recovery could be had under the Virginia Death Statute (Section 5786 of the Code of Virginia), and as dependency is not required for recovery under that statute, decree was entered for the administrator. (R. 37.) Appeal was taken and the single question was whether the administrator of the deceased seaman, as he left no dependents, was entitled to recovery, upon the theory that the Jones Act provided an exclusive remedy, and as dependency was a condition of recovery the action could not be maintained. If the Jones Act provides an exclusive remedy, the ruling of the Circuit Court of Appeals was correct. If the action could be maintained under the Vir-

ginia Death Statute, the ruling of the District Judge was correct. The death occurred within the State of Virginia.

ARGUMENT

It is conceded that State Death Statutes apply in cases of personal injury resulting in death of seamen prior to legislation on the subject by Congress. (*Western Fuel Company* v. *Garcia*, 257 U. S. 233; *Great Lakes D. & D. Co.* v. *Kierejewski*, 261 U. S. 479.) It is equally well settled that as soon as Congress has acted, the legislation of the States is superseded and that of Congress becomes supreme and exclusive. *Second Employers' Liability Cases*, 223 U. S. 1, 54. Congress has so legislated by Section 33 of the Merchant Marine Act which makes applicable the provisions of the Federal Employers' Liability Act to seamen. Section 1 of that Act makes dependency a condition to right of recovery. *Gulf, Colorado, etc., Ry. Co.* v. *McGinnis*, 228 U. S. 173.

We consider the question is answered by the opinion of this Court in the case of *Northern Coal and Dock Company* v. *Strand*, October Term, 1928, No. 41, decided December 10, 1928, where the rule is thus stated:

> We think it necessarily follows from former decisions that by the Merchant Marine Act—the measure of general application—Congress provided a method under which the widow of Strand might secure damages

resulting from his death, and that no State statute can provide any other or different one.

It follows the application for certiorari is without merit and should be denied.

WILLIAM D. MITCHELL,
Solicitor General.
GEORGE R. FARNUM,
Assistant Attorney General.
J. FRANK STALEY,
Attorneys for the United States.

FEBRUARY, 1929.

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CHARLES ELMORE CROP
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No. 25

In the Supreme Court of the United States

OCTOBER TERM, 1929

C. A. LINDGREN, ADMINISTRATOR OF THE ESTATE OF C. E. BARFORD, DECEASED, PETITIONER

v.

THE UNITED STATES OF AMERICA AND COLONNA'S SHIPYARD, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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C. A. LINDGREN, ADMINISTRATOR OF THE ESTATE OF C. E. Barford, Deceased, Petitioner

v.

THE UNITED STATES OF AMERICA AND COLONNA'S Shipyard, Incorporated

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 45–53) is reported in 28 F. (2d) 725. The opinion of the District Court for the Eastern District of Virginia on final hearing is not reported but is found at pages 34–37 of the Record. No opinion was rendered by the District Court when it overruled the exception to the libel. (R. 11.)

JURISDICTION OF THIS COURT

The decree sought to be reviewed was entered October 19, 1928. (R. 55.) Petition for certiorari

was filed on January 15, 1929, and granted February 25, 1929. (R. 57.)

QUESTION PRESENTED

The ultimate question is whether the administrator of the estate of a deceased seaman who left no dependents is entitled to recover damages for his death caused by negligence of the officers in charge of the Government vessel on which he was working in Virginia or its unseaworthiness, in a case in which the accident and death occurred in 1926.

The question of law is whether the Virginia statute, giving a right of action in such a case even though deceased left no dependents, is superseded by the Act of Congress known as the "Jones Act" (Sec. 33, Merchant Marine Act, 1920, c. 250, 41 Stat. 988, 1007), which by incorporation of the provisions of the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, limits recovery for the death of a seaman to cases in which he leaves certain specified relatives or dependents.

STATUTES INVOLVED

Section 33 of the Merchant Marine Act of 1920, c. 250, 41 Stat. 988, 1007 (U. S. C. Title 46, Sec. 688), provides:

> That section 20 of such Act of March 4, 1915, be, and is, amended to read as follows:
>
> "SEC. 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain

an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65 (U. S. C. Title 45, Sec. 51), provides in Section 1:

That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of

the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

By Section 2 of the Act of April 5, 1910, c. 143, 36 Stat. 291 (U. S. C. Title 45, Sec. 59) the following section was added to the above Act:

SEC. 9. That any right of action given by this Act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

Section 5786 of the statutes of the State of Virginia (Code of 1924) provides:

Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, or of any ship or vessel, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, or to proceed in rem

against said ship or vessel, or in personam against the owners thereof or those having control of her, and to recover damages in respect thereof, then, and in every such case, the person who, or corporation or ship or vessel which, would have been liable, if death had not ensued, shall be liable to an action for damages, or, if a ship or vessel, to a libel in rem, and her owners or those responsible for her acts or defaults or negligence to a libel in personam, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony.

STATEMENT

Petitioner, as administrator, filed a libel under the Suits in Admiralty Act of March 9, 1920, c. 95, 41 Stat. 525 (U. S. C. Title 46, Sec. 741 et seq.), against the United States and a corporation owning a shipyard at Norfolk, Virginia, to recover damages for the death of his decedent. The libel does not elect to proceed upon principles of libels *in rem*, as provided by Section 3 of that Act, but in form and substance bases the claim upon principles of libels *in personam*. (R. 1–5.)

The libel alleges that the decedent was a seaman employed as third mate on the *Hybert*, owned by the United States, and that on October 5, 1926, while engaged in his duties as third mate, the vessel then being in dry dock of the Colonna's Shipyard, Inc., undergoing repairs, he was directed by the Chief Officer to secure the measurements of a

small ball and catch which belonged in the bottom of one of the lifeboats which at that time was swinging out on the vessel's davits and suspended over the dry dock. While decedent was attempting to crawl into the lifeboat, one end suddenly became released, causing the lifeboat to swing downward, throwing him to the bottom of the dry dock and instantly causing his death. The libel alleged that the accident was due to negligent fastening of the lines between the lifeboat and the davits, the negligent, careless, and improper manner in which the lifeboat was fastened to the same, and the careless, negligent, and wrongful manner in which the lifeboat was swung over the side of the steamship. (R. 2.) The sixth paragraph of the libel (R. 3) avers that the death was due to fault, negligence, wrongdoing or want of care of the respondents (both the shipyard and the Government), their officers, servants, and employees, in various specified particulars.

Negligence of the owner was based both on unseaworthiness in the equipment and on negligence on the part of the officers and crew of the vessel. (R. 3–5.)

The United States excepted to the libel on the ground that it failed to state a cause of action under Section 33 of the Merchant Marine Act of 1920 (the Jones Act) and that that Act furnished the exclusive remedy open to the libellant. (R. 10–11.) The exception was overruled without opinion. (R. 11.)

Answers were filed by both respondents. (R. 8, 12.)

On final hearing the District Court (Groner, J.) found that the installation of a device for fastening the line between the davit and the stern of the lifeboat was negligent because not installed in alignment or that a certain opening was not sufficiently large, that the device was unseaworthy, and that libellant was entitled to recovery against the United States. (R. 34–36.) A final decree ordering a recovery of $5,000 against the United States and dismissing the libel as to the corporation was entered. (R. 37–38.)

The District Court found that the decedent left surviving him no parent, child, brother, sister, or dependent, and this finding is not challenged. (R. 37.)

Upon appeal, the Circuit Court of Appeals for the Fourth Circuit unanimously reversed the decree on the only ground urged—that the Jones Act superseded the State statute and became the exclusive legislation applicable. (R. 46–53.)

In the Circuit Court of Appeals, counsel for all parties stipulated that no claim of error would be asserted against the defendant shipyard corporation (R. 44), and no question as to its liability is raised in this Court.

SUMMARY OF ARGUMENT

1. In the absence of legislation by Congress, the Virginia death statute would be applicable. Al-

though in the absence of statute, no suit to recover damages for the death of a human being may be maintained in admiralty, the admiralty courts have entertained libels *in personam* for damages for death given by a State statute where death has resulted from a maritime tort committed on navigable waters within the State.

2. The Jones Act brings into the maritime law new rules drawn from another system. It extends territorially as far as Congress can make it go, and there is nothing in it to cause its operation to be otherwise than uniform. It is comprehensive and exclusive, and a measure of general application. It provides a method under which relatives of a seaman killed by injuries for which his employer is responsible may obtain damages in an admiralty suit. In the instant case the decedent was a seaman who suffered "personal injuries in the course of his employment" within the meaning of the Act. The employment of the decedent and his relation to the owner of the vessel were maritime. The negligence to which his death was due was neglect in connection with a part of the equipment of the vessel, and the tort which caused his death was one which was subject to admiralty jurisdiction. The provisions of the Federal Employers' Liability Act, which the Jones Act incorporates by reference, cover the field of death due to negligence in "appliances * * * boats * * * or other equipment," and consequently cover the defect in the locking device on the lifeboat which caused the

decedent's death. The Jones Act comprehends the whole subject of liability of an employer for death of a seaman as a result of injuries occurring in the course of his employment and caused by a maritime tort, and consequently covers the field within which the instant case falls.

3. The Jones Act by generic reference incorporates the provisions of the Employers' Liability Act, which gives a right of action for death only if the decedent left certain specified relatives or dependents.

4. The power of Congress over maritime matters extends to the whole subject of maritime jurisdiction. As the power of Congress is paramount in the exercise of authority in reference to the maritime law, its statute (the Jones Act) must control and exclude all State legislation having application to the field which its statute covers. The fact that it provides for no recovery in certain situations in which the State death statute does provide for a recovery does not allow resort to the State statute, for there is but one wrongful invasion of the seaman's primary right of bodily safety, and the Federal statute provides when there shall be a recovery for that wrong.

5. The first clause of the Jones Act, which relates to injury not resulting in death, gives the seaman a right of election between compensatory damages for injuries caused by negligence and the right under the old rules to recover indemnity for injuries occasioned by unseaworthiness. No right of

election is given in the second clause of the Jones Act, which deals with death. Under the maritime law, no remedy for death existed and there is nothing in the Jones Act indicating an intention to allow a resort to State statutes.

6. Petitioner's motion for increase in the amount of award of damages should be denied if this Court should consider it.

ARGUMENT

I

IN THE ABSENCE OF LEGISLATION BY CONGRESS, THE VIRGINIA DEATH STATUTE WOULD BE APPLICABLE

As this Court said in *Western Fuel Co.* v. *Garcia*, 257 U. S. 233, 240:

> It is established doctrine that no suit to recover damages for the death of a human being caused by negligence, may be maintained in the admiralty courts of the United States under the general maritime law. At the common law no civil action lies for an injury resulting from death. The maritime law as generally accepted by maritime nations leaves the matter untouched and in practice each of them has applied the same rule for the sea which it maintains on land.

But this same case held that in the absence of legislation by Congress, where death results from maritime tort committed on navigable waters within a State whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel *in personam* for the

damages sustained by those to whom such right is given.

The Virginia statute (copied on pp. 4–5, *supra*) gives such a right of action. The instant case was brought expressly under the Suits in Admiralty Act of March 9, 1920, c. 95, 41 Stat. 525. (R. 5.) If there had been no other Act of Congress applicable, the petitioner would, by virtue of the provisions of that Act, have had a cause of action against the United States.

II

THE JONES ACT COMPREHENDS THE WHOLE SUBJECT OF LIABILITY OF AN EMPLOYER FOR DEATH OF SEAMEN AS A RESULT OF INJURIES OCCURRING IN THE COURSE OF THEIR EMPLOYMENT WHERE THE TORT IS MARITIME, AND COVERS THE FIELD IN WHICH THE INSTANT CASE FALLS

The wording of the Jones Act (Sec. 33 of the Merchant Marine Act of 1920, pp. 2–3, *supra*) is so broad that it may well be characterized as "comprehensive and also exclusive" and as "a measure of general application." See *Northern Coal Co.* v. *Strand*, 278 U. S. 142, 147. In *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 388, 392, this Court held that it brought into the maritime law "new rules drawn from another system," that it "extends territorially as far as Congress can make it go, and there is nothing in it to cause its operation to be otherwise than uniform."

It provides a method under which relatives of a seaman killed by injuries for which his employer is responsible may obtain damages in admiralty proceedings. *Northern Coal Co.* v. *Strand*, 278

U. S. 142, *supra*. It is exclusive of State compensation laws. *Ibid*, pp. 145, 146. And it has also been held that under the Act jurisdiction of the State courts is concurrent with that of the Federal courts. *Engel* v. *Davenport*, 271 U. S. 33.

The constitutionality of the Act was upheld in *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, *supra*.

There can be no doubt that in the instant case, the decedent was a "seaman" who suffered "personal injury in the course of his employment," within the meaning of the Act. The libel alleges, and the facts as proved and found by the District Court show, that while he was engaged in his duties as third mate on the vessel, which was in dry dock, he was ordered by the Chief Officer of the vessel to go into a lifeboat which was swinging on the vessel's davits, and that because of the sudden release of one end of the lifeboat, he was thrown to the dry dock and instantly killed. (R. 2, 34.) Counsel for petitioner expressly admit that the decedent was a "seaman" and they applied to this Court under the Seamen's Act of July 1, 1918. (Brief in support of petition for writ of certiorari, p. 5.)

The employment of the decedent and his relation to the owner of the vessel were maritime. The negligence to which his death was due was neglect in connection with a part of the equipment of the vessel, and the "wrongful invasion of his primary right of bodily safety" occurred while he was working on the vessel. It has been held that a tort committed on a vessel while in a floating dry dock or

in an ordinary dry dock is subject to admiralty jurisdiction. *Gonsalves* v. *Morse Dry Dock Co.*, 266 U. S. 171; *The Anglo-Patagonian,* 235 Fed. 92 (certiorari denied, 242 U. S. 636). See also *London Co.* v. *Industrial Commission,* 279 U. S. 109, in which the recent cases on admiralty jurisdiction over torts are abstracted and discussed.

The petitioner contends, however, that the decedent's death was caused by unseaworthiness of the vessel, and that "as there is no Federal death statute occupying *that field,* he [petitioner] can apply the death statute of the state in which the accident occurred." (Brief in support of petition for writ of certiorari, pp. 7–8, 13–14.) The District Court found that there was negligence, and did say that the locking device on the apparatus by which the life boat was suspended was unseaworthy. (R. 36.) But the Jones Act incorporated by reference the provisions of The Federal Employers' Liability Act (pp. 3–4, *supra*), which expressly apply to death of an employee from injury—

> resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its * * * appliances, * * * boats, * * * or other equipment.

The defect in the device which caused the death of the decedent was a matter covered by the Jones Act. We consequently submit that the field within which the instant case falls is covered by the Fed-

eral statute, and that it provides a complete system for recovery for death of a seaman.

III

THE JONES ACT PROVIDES IN EFFECT THAT THERE SHALL BE NO RECOVERY FOR DEATH IN THE FIELD WHICH IT COVERS IF THE DECEDENT DID NOT LEAVE CERTAIN SPECIFIED RELATIVES OR DEPENDENTS

The Jones Act (pp. 2–3, *supra*) provides that in the action which it gives "all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable."

In *Engel* v. *Davenport*, 271 U. S. 33, it was held that this generic reference incorporated in the Jones Act the provisions of the Employers' Liability Act (pp. 3–4, *supra*), which Act gives a right of action—

> in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parent; and, if none, then of the next of kin dependent upon such employee.

See also *Gulf, Colorado &c. Ry. Co.* v. *McGinnis*, 228 U. S. 173; *North Carolina Railroad Co.* v. *Zachary*, 232 U. S. 248, 256.

As the death in the instant case was instantaneous, there can be no recovery on the right of action given to an injured person (as distinguished from his relatives) which by virtue of Section 9 (p. 4, *supra*) survives his death. See *St. Louis & Iron Mountain Ry.* v. *Craft*, 237 U. S. 648, 655.

IV

THE JONES ACT PROVIDES THE EXCLUSIVE REMEDY FOR THE DEATH INVOLVED IN THE INSTANT CASE

As an original proposition, it might be urged that, as against the United States, The Federal Employees' Compensation Act, c. 458, 39 Stat. 742 (U. S. C. Title 5, Sec. 751 et seq.), provides the exclusive remedy. However, the Government in its exception to the libel took the position that the Jones Act furnished the exclusive remedy, and the Compensation Act apparently has not been mentioned in any phase of the proceedings. Moreover, if the Compensation Act is applicable, it would supersede the State statute for the same reasons which we urge for the exclusiveness of the remedy given by the Jones Act. If the Compensation Act is not applicable, the Jones Act is. Consequently we shall not consider the Compensation Act further.

The power of Congress over maritime matters extends to the whole subject of admiralty jurisdiction. *Panama R. R. Co.* v. *Johnson,* 264 U. S. 375, *supra.* State statutes may be considered only in so far as they deal with subjects upon which Congress has not acted. The Jones Act, as construed by this Court, comprehensively embraces the whole subject of liability of an employer for death of seamen as a result of injuries in the course of their employment, at least where the tort is one of which admiralty has jurisdiction. (See pp. 11–13,

supra.) As the power of Congress is paramount in the exercise of authority in reference to the maritime law, its statute must control and exclude all State legislation having application to the field which its statute covers. *Engel* v. *Davenport,* 271 U. S. 33, 39, *supra; Northern Coal Co.* v. *Strand,* 278 U. S. 142, *supra.* To allow resort to the death statutes of the forty-eight States in situations in which they give greater or different rights than does the Jones Act would obviously destroy the uniform operation of that Act. As the States are unable to change the general features of the maritime law so as to defeat uniformity, their statutes should not be allowed to obstruct the uniformity in operation of a new Act of Congress in the field of the maritime law. See *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, 241, *supra.*

The petitioner argues that as the Jones Act provides for no recovery in the case of the death of a seaman leaving no relatives of the kind designated in the Federal Employers' Liability Act and no dependents, there should still be a right to recovery under the Virginia statute. From the above discussion, however, it is clear that the Jones Act does provide in whose behalf a recovery can be had in the case of a death like that involved in the instant case. Where negligence causes such a death—at least if it is instantaneous—there is but a single wrongful invasion of a single primary right, regardless of the nature of the negligence or of any multiplication of grounds of negligence. See

Baltimore S. S. Co. v. *Phillips,* 274 U. S. 316, 321; *Pacific Co.* v. *Peterson,* 278 U. S. 130, 138. As the recent brief filed by the petitioner states, " there can be but one actionable wrong in any case." (P. 8.) The principle of exclusiveness of remedy must apply wherever a Federal statute prescribes rules for recovery in the case of the wrong involved. If a State statute could be resorted to in every case in which the remedy given by the Federal statute is not coextensive with that given by the State statute, the whole principle of exclusiveness of remedy would be futile and would be resolved merely to the empty proposition that where a Federal statute and the State statute are in all respects identical, the Federal statute should govern.

Situations similar to that in the case at bar have arisen under the Federal Employers' Liability Act itself. It has been held that as it fully covers the subject of the obligations of interstate railroad carriers to make compensation for personal injuries suffered by their employees while engaged in interstate commerce, no room exists for State regulation even in respect to injuries occurring without fault, as to which the Federal Act provides no remedy, and that, therefore, an award made under a State Workmen's Compensation Act for such injuries can not be upheld. *New York Central R. R. Co.* v. *Winfield,* 244 U. S. 147. See also *Second Employers' Liability Cases,* 223 U. S. 1.

V

NO RIGHT OF ELECTION EXISTS BETWEEN THE REMEDY GIVEN BY THE JONES ACT AND THAT GIVEN BY THE VIRGINIA DEATH STATUTE

The first clause of the Jones Act gives the seaman a right of election. The language does not clearly show between what the election is given. This Court, however, said in *Pacific Co.* v. *Peterson*, 278 U. S. 130, 139, *supra:*

> the alternative measures of relief accorded him, between which he is given an election, are merely the right under the new rule to recover compensatory damages for injuries caused by negligence and the right under the old rules to recover indemnity for injuries occasioned by unseaworthiness * * *.

No right of election is given in the second clause, which deals with death, and we submit that Congress did not intend to give any election for the simple reason that under the maritime law no remedy for death existed. There is nothing in the statute indicating any intention to allow a resort to State statutes. The absence of any such mention of State statutes in the Act is particularly significant in view of the fact that the same Congress in the "Death on the High Seas Act," c. 111, 41 Stat. 537 (U. S. C. Title 46, Sec. 761 et seq.), which was passed only a few weeks before the Jones Act, expressly provided in Section 7 that the provisions of any State death statute "shall not be affected by this Act." From the foregoing discus-

sion, it is clear that the operation of the State statutes for death was intended to be affected by the Jones Act.

VI

THE MOTION FOR INCREASE IN AMOUNT OF AWARD OF DAMAGES SHOULD BE DENIED

Counsel for petitioner have filed a motion in this Court for increase of damages from $5,000 to $10,000. The application for certiorari did not suggest that the award was inadequate. The sufficiency of the award is questioned for the first time in any court by the present motion.

The decedent was in his fiftieth year, and was earning $125 a month. (R. 37.)

If this Court should consider the motion, we submit that it should be denied.

CONCLUSION

We submit that the decision of the Circuit Court of Appeals is sound and that its decree should be affirmed.

CHARLES E. HUGHES, Jr.,
Solicitor General.
GEORGE R. FARNUM,
Assistant Attorney General.
CLAUDE R. BRANCH,
Special Assistant to the Attorney General.
J. FRANK STALEY,
Attorney.

OCTOBER, 1929.

U. S. GOVERNMENT PRINTING OFFICE: 1929

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No. 25

In the Supreme Court of the United States

OCTOBER TERM, 1929

C. A. LINDGREN, ADMINISTRATOR OF THE ESTATE OF C. E. BARFORD, DECEASED, PETITIONER

v.

THE UNITED STATES OF AMERICA AND COLONNA'S SHIPYARD, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES SUBMITTED AFTER THE HEARING

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 25

C. A. LINDGREN, ADMINISTRATOR OF THE ESTATE OF C. E. Barford, Deceased, petitioner

v.

THE UNITED STATES OF AMEFICA AND COLONNA'S Shipyard, Incorporated

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES SUBMITTED AFTER THE HEARING

The following opinions support the proposition that the liability of a shipowner for unseaworthiness of a vessel is not that of an insurer, but rests on the lack of due care.

Storgard v. *France Corp.*, 263 Fed. 545, 547.

Patton-Tully Transportation Co. v. *Turner*, 269 Fed. 334, 338–339.

Burton v. *Greig*, 271 Fed. 271.

See also:

The Osceola, 189 U. S. 158, 171.
Pacific Co. v. *Peterson,* 278 U. S. 130, 138.

Respectfully submitted.

CHARLES E. HUGHES, Jr.,
Solicitor General.
CLAUDE R. BRANCH,
Special Assistant to the Attorney General.
J. FRANK STALEY,
Attorney.

OCTOBER, 1929.

U. S. GOVERNMENT PRINTING OFFICE: 1929

SUPREME COURT OF THE UNITED STATES.

No. 25.—October Term, 1929.

C. A. Lindgren, Administrator of the Estate of C. E. Barford, deceased, Petitioner,
vs.
The United States of America and Colonna's Shipyard, Incorporated.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[February 24, 1930.]

Mr. Justice Sanford delivered the opinion of the Court.

This case depends upon the construction and effect of § 33 of the Merchant Marine Act of 1920,[1] which amended § 20 of the Seamen's Act of 1915[2] so as to provide:

"That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in case of railway employees shall be applicable. . . ."

By this Act, as heretofore construed by this Court, the prior maritime law of the United States was modified by giving to seamen injured through negligence the rights given to railway employees by the Federal Employers' Liability Act and its amendments, and permitting these new and substantive rights to be asserted and enforced in actions *in personam* against the employers in federal and state courts administering common law remedies, or in suits in admiralty in courts administering maritime remedies. *Panama R. R.*

[1] 41 Stat. 988, c. 250; U. S. C., Tit. 46, § 688.
[2] 38 Stat. 1164, c. 153.

Co. v. *Johnson*, 264 U. S. 375; *Engel* v. *Davenport*, 271 U. S. 33; *Panama R. R.* v. *Vasquez*, 271 U. S. 557; *Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316; *Pacific Co.* v. *Peterson*, 278 U. S. 130.

The Federal Employers' Liability Act,[3] which was incorporated in the Merchant Marine Act by reference, related to the liability of common carriers by railroad to their employees in interstate and other commerce, as specified. Sec. 1 provided that every such carrier "shall be liable in damages" to any employee suffering injury, "or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." By this section if the injury to the employee results in death his personal representative—while not given any right of action in behalf of the estate—is invested, solely as trustee for the designated survivors, with the right to recover for their benefit such damages as will compensate them for any pecuniary loss which they sustained by the death. See *St. Louis & Iron Mtn. Ry.* v. *Craft*, 237 U. S. 648, 654; *C. B. & Q. R. R.* v. *Wells-Dickey Co.*, 275 U. S. 161, 163. And if the employee leaves no survivors in any of the classes of beneficiaries alternatively designated, it necessarily follows that the personal representative cannot maintain any action to recover damages for the death, since there is no beneficiary in whose behalf such an action can be brought.

In 1926, Barford, a seaman employed as third mate on a merchant vessel owned by the United States—then lying at the port of Norfolk, Virginia, in a floating drydock of Colonna's Shipyard, Inc., in which it was being reconditioned—while working in a lifeboat swinging on the vessel's davits, was thrown on the dock by the sudden release of one end of the lifeboat and instantly killed. Lindgren, the administrator of his estate, proceeding under the Suits in Admiralty Act,[4] filed a libel *in personam* against the United States in the Federal District Court for Eastern Virginia

[3] 35 Stat. 65, c. 149; U. S. C., Tit. 45, § 51.
[4] 41 Stat. 525, c. 95; U. S. C., Tit. 46, c. 20.

to recover damages for his death.[5] The libel declared specifically "in a cause of tort and death by wrongful act;" alleged that Barford's death was occasioned by negligence and wrongdoing on the part of the United States, its officers, servants and employees in respect to the fastening of the lifeboat and various other matters; and averred that the libellant, as administrator of Barford's estate, was entitled to recover, "for and on behalf of the decedent's dependents and heirs," damages for his death. It did not allege, however, that Barford left surviving him either a widow, child or parent, or any next of kin dependent upon him; nor that his death was caused by unseaworthiness of the vessel.

The United States unsuccessfully excepted to the libel on the ground that it "failed to state a cause of action," and then answered on the merits, averring *inter alia*, that in any event it would not be liable to damages in excess of the proved dependency of such dependents as Barford might have left surviving him.

At the hearing it was not shown that Barford left any survivor in any of the classes designated as beneficiaries by the Federal Employers' Liability Act; there being no evidence that his heirs, a nephew and niece, were dependent upon him.

The District Court found that Barford's death was caused by the negligent installation of the releasing gear in the lifeboat, which permitted it to fall and made this device unseaworthy; held that, although the administrator could not recover under the Merchant Marine Act, applying the rule under the Federal Employers' Liability Act, since the surviving nephew and niece were not dependent, he was entitled to recover under the Virginia Death Statute,[6] which provided that a personal representative might maintain a suit for damages on account of the death of a person caused by the wrongful act of another—under which dependency was not a necessary condition and the probable earnings of the decedent might be shown; and fixed the damages under this statute at $5,000, for which the administrator was given a decree against the United States.

On appeal the Circuit Court of Appeals held that the right of action given to the personal representative of a seaman by the Mer-

[5]The Shipyard was also impleaded as a codefendant; but at the hearing in the District Court, pursuant to a concession made by counsel for the administrator, the libel was dismissed as against it. This is not here in question.

[6]Code of Virginia, § 5786, *et seq.*

chant Marine Act for personal injury resulting in death, was exclusive and superseded the Virginia Death Statute; and since, under the provisions of the Federal Employers' Liability Act incorporated in the Merchant Marine Act, there could be no recovery, reversed the decree of the District Court and dismissed the libel. 28 F. (2d) 725.

It is clear that, as Barford left no survivors designated as beneficiaries by the Federal Employers' Liability Act, the administrator was not entitled to maintain an action for the recovery of damages under the provisions of that Act, made applicable in case of the death of a seaman by § 33 of the Merchant Marine Act. But while this is not questioned by the administrator, he urges that the right of action given the personal representative by the Merchant Marine Act is not exclusive, and that it neither supersedes the right of action given him by the death statute of the State in which the injury was sustained, nor precludes his right to recover indemnity for the death under the old admiralty rules on the ground that the injuries were occasioned by the unseaworthiness of the vessel. These contentions cannot be sustained.

1. Prior to the adoption of the Merchant Marine Act the general maritime law of the United States did not authorize any recovery of damages or indemnity for the death of a seaman, whether the injury was caused by the negligence of the owner or other members of the crew or the unseaworthiness of the vessel. See *The Harrisburg*, 119 U. S. 199; *The Osceola*, 189 U. S. 158, 175; *Western Fuel Co.* v. *Garcia*, 257 U. S. 233, 240. In this situation it was held, in the absence of any legislation by Congress, that where a seaman's death resulted from a maritime tort on navigable waters within a State whose statutes gave a right of action on account of death by wrongful act, the admiralty courts could entertain a libel *in personam* for the damages sustained by those to whom such right was given. *Western Fuel Co.* v. *Garcia*, *supra*, 242; *Gt. Lakes Co.* v. *Kierejewski*, 261 U. S. 479, 480.[1] But, as said by the Circuit Court of Appeals, such statutes "were not a part of the general maritime law" and were recognized only because Congress had not legislated on the subject.

[1] In each of these cases the death had occurred before the adoption of the Merchant Marine Act; in the *Garcia* case in 1916 (238); and in the *Kierejewski* case in 1919 (see 280 Fed. 125, 126).

By the Merchant Marine Act, however, the prior maritime law was modified by giving to personal representatives of seamen whose death had resulted from personal injuries, the right to maintain an action for damages in accordance with the provisions of the Federal Employers' Liability Act. It is plain that the Merchant Marine Act is one of general application intended to bring about the uniformity in the exercise of admiralty jurisdiction required by the Constitution, and necessarily supersedes the application of the death statutes of the several States. This has been determined in two prior decisions of this Court. In *Panama Railroad Co.* v. *Johnson, supra*, 392—the pioneer case in which the constitutionality and effect of § 33 of the Merchant Marine Act was considered and dealt with at length—in answering the assertion that the Act departed from the constitutional requirement that it should be coextensive with and operate uniformly in the whole of the United States, the Court said: "The statute extends territorially as far as Congress can make it go, and there is nothing in it to cause its operation to be otherwise than uniform. The national legislation respecting injuries to railway employees engaged in interstate and foreign commerce which it adopts has a uniform operation, and neither is nor can be deflected therefrom by local statutes or local views of common law rules. *Second Employers' Liability Cases*, 223 U. S. 1, 51, 55; *Baltimore & Ohio R. R. Co.* v. *Baugh*, 149 U. S. 368, 378. Of course that legislation will have a like operation as part of this statute." And recently we said in *Northern Coal Co.* v. *Strand*, 278 U. S. 142, 147: "We think it necessarily follows from former decisions that by the Merchant Marine Act—a measure of general application—Congress provided a method under which the widow of (a seaman) might secure damages resulting from his death, and that no state statute can provide any other or different one." To the same effect is *Patrone* v. *Howlett*, 237 N. Y. 394, 397, in which the court said that the administrators of a seaman killed in the course of his employment, "did not have a remedy under the state act after the (Merchant Marine) Act occupied the field and became a part of the general maritime law."

These decisions are in accordance with the long settled rule that since Congress by the Federal Employers' Liability Act took possession of the field of the employers' liability to employees in interstate transportation by rail, all state laws on the subject are super-

seded. *Second Employers' Liability Cases, supra,* 54; *Seaboard Air Line* v. *Horton,* 233 U. S. 492, 501; *New York Central R. R. Co.* v. *Winfield,* 244 U. S. 147, 149; *Erie R. R. Co.* v. *Winfield,* 244 U. S. 170, 172; and cases cited. In the *Second Employers' Liability Cases, supra,* 54, this Court said: "True, prior to the present act the laws of the several States were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employés while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the States in the absence of action by Congress. *Sherlock* v. *Alling,* 93 U. S. 99; *Smith* v. *Alabama,* 124 U. S. 465, 473, 480, 482; *Nashville, &c. Railway* v. *Alabama,* 128 U. S. 96, 99; *Reid* v. *Colorado,* 187 U. S. 137, 146. The inaction of Congress, however, in no wise affected its power over the subject. *The Lottawanna,* 21 Wall. 558, 581; *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196, 215. And now that Congress has acted, the laws of the States, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is. *Gulf Colorado and Santa Fe Railway Co.* v. *Hefley,* 158 U. S. 98, 104; *Southern Railway Co.* v. *Reid,* 222 U. S. 424; *Northern Pacific Railway Co.* v. *Washington,* 222 U. S. 370."

In *New York Central R. R. Co.* v. *Winfield, supra,* 150, 153, the Court furthermore held that although the Federal Employers' Liability Act "does not require the carrier to respond for injuries occurring where it is not chargeable with negligence," this is "because Congress, in its discretion, acted upon the principle that compensation should be exacted from the carrier where, and only where, the injury results from negligence imputable to it"; that the Act "is as comprehensive of injuries occurring without negligence, as to which class it impliedly excludes liability, as it is of those as to which it imposes liability" and "is a regulation of the carriers' duty or obligation as to both"; and that "the reasons which operate to prevent the States from dispensing with compensation where the act requires it equally prevent them from requiring compensation where the act withholds or excludes it." This was followed and approved in *Erie R. R. Co.* v. *Winfield, supra,* 172, in which the Court said that the Act "establishes a rule or regulation which is intended to operate uniformly in all the

States, as respects interstate commerce, and in that field it is both paramount and exclusive."

In the light of the foregoing decisions and in accordance with the principles therein announced we conclude that the Merchant Marine Act—adopted by Congress in the exercise of its paramount authority in reference to the maritime law and incorporating in that law the provisions of the Federal Employers' Liability Act—establishes as a modification of the prior maritime law a rule of general application in reference to the liability of the owners of vessels for injuries to seamen extending territorially as far as Congress can make it go; that this operates uniformly within all of the States and is as comprehensive of those instances in which by reference to the Federal Employers' Liability Act it excludes liability, as of those in which liability is imposed; and that, as it covers the entire field of liability for injuries to seamen, it is paramount and exclusive, and supersedes the operation of all state statutes dealing with that subject.

It results that in the present case no resort can be had to the Virginia Death Statute, either to create a right of action not given by the Merchant Marine Act, or to establish a measure of damages not provided by that Act.

2. Nor can the libel be sustained as one to recover indemnity for Barford's death under the old maritime rules on the ground that the injuries were occasioned by the unseaworthiness of the vessel. Aside from the fact that the libel does not allege the unseaworthiness of the vessel and is based upon negligence alone, an insuperable objection to this suggestion is that the prior maritime law, as hereinabove stated, gave no right to recover indemnity for the death of a seaman, although occasioned by unseaworthiness of the vessel. The statement in *The Osceola, supra,* 175, on which the administrator relies, relates only to the seaman's own right to recover for personal injuries occasioned by unseaworthiness of the vessel, and confers no right whatever upon his personal representatives to recover indemnity for his death. Apparently for this reason the words "at his election,"—which appear in the first clause of § 33 of the Merchant Marine Act, relating to the personal right of action of an injured seaman, and, as held in *Pacific Co.* v. *Peterson, supra,* 139, gave him, as alternative measures of relief, "an election between the right under the new rule to recover compensatory damages for injuries caused by negligence,

and the right under the old rules to recover indemnity for injuries occasioned by unseaworthiness''—were omitted from the second clause of § 33 of the Merchant Marine Act, relating to the right of the personal representative to recover damages for the seaman's death, since there was no right to indemnity under the prior maritime law which he might have elected to pursue. And, for the reasons already stated, and in the absence of any right of election, the right of action given the personal representative by the second clause of § 33 to recover damages for the seaman's death when caused by negligence, for and on behalf of designated beneficiaries, is necessarily exclusive and precludes the right of recovery of indemnity for his death by reason of unseaworthiness of the vessel, irrespective of negligence, which cannot be eked out by resort to the death statute of the State in which the injury was received.

3. It is suggested in argument that if the statutes of the several States are superseded by the Merchant Marine Act it would follow that the Death on the High Seas Act,[8] which had been previously adopted, would likewise be superseded. That Act, however, concededly has no application here, since Barford's death did not occur on the high seas but within the territorial limits of the State of Virginia. We have no occasion to consider its scope and effect here and do not determine what effect, if any, the Merchant Marine Act has upon it; and nothing stated in this opinion is to be considered as having any reference to those questions. Nor do we consider or determine the effect of the Federal Employees Compnsation Act,[9] upon which, although incidentally referred to in argument, neither the administrator nor the United States here relies.

The decree is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[8] 41 Stat. 537, c. 111, U. S. C., Tit. 46, c. 21.
[9] 39 Stat. 742, c. 458, U. S. C., Tit. 5, c. 15.